3.

SUPREME COURT OF THE UNITED STATES.

No. ~~851~~ 238-86

WILLIAMINA H. WILLIAMSON, DAVID R. WILLIAMSON, MARY A. WILLIAMSON, ISABELLA WILLIAMSON, CATHARINE B. WILLIAMSON, CHARLOTTE A. WILLIAMSON, RUPERT J. COCHRANE, ISABELLA M. COCHRANE, AND BAYARD CLARKE, PLAINTIFFS IN ERROR,

vs.

JAMES H. SUYDAM.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 28, 1865.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 351.

WILLIAMINA H. WILLIAMSON, DAVID R. WILLIAMSON, MARY A. WILLIAMSON, ISABELLA WILLIAMSON, CATHARINE B. WILLIAMSON, CHARLOTTE A. WILLIAMSON, RUPERT J. COCHRANE, ISABELLA M. COCHRANE, AND BAYARD CLARKE, PLAINTIFFS IN ERROR,

vs.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Williamina H. Williamson, David R. Williamson, Mary A. Williamson, Isabella Williamson, Catharine B. Williamson, Charlotte A. Williamson, Rupert J. Cochrane, Isabella M. Cochrane, and Bayard Clarke, plaintiffs, and James H. Suydam, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as is said, and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid, being inspected, the said justices of the Supreme Court may cause further to to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

2 WILLIAMANIA H. WILLIAMSON *et al.*
vs.
JAMES H. SUYDAM.

By virtue of the within writ of error, and in obedience thereto, I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, do hereby certify and return the judgment and proceedings in the case in the writ within mentioned, and do hereby certify that the following pages, numbered from 1 to 56, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Williamania H. Williamson, and *als. vs.* James H. Suydam, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district

of New York, in the second circuit, this 27th day of December, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the said United States the ninetieth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[Int. rev. stamp, 5 cts.]

Indorsed: Supreme Court of the United States. Williamina H. Williamson and others, plaintiffs in error, *against* James H. Suydam, defendant in error. Writ of error.

Allowed.

W. D. SHIPMAN, *Judge.*

Filed June 14, '65.

3 SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that on the fifteenth day of August, in the year of our Lord one thousand eight hundred and forty-five, in the present April term of this court, before the circuit court of the United States of America for the southern district of New York, in the second circuit, at the city of New York, in the said southern district, before the judges of the said court, came the plaintiffs, Charles A. Williamson and Catherine H., his wife, Rupert J. Cochran and Isabella M., his wife, and Bayard Clarke, by Stephen J. Field, their attorney, and brought into the said court, before the aforesaid judges thereof, their certain declaration against James H. Suydam, being in custody, &c., in a plea of ejectment, which said declaration follows in these words, that is to say:

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles A. Williamson and Catherine H., his wife, citizens of the State of Maryland, Rupert J. Cochran and Isabella M., his wife, citizens of the State of Massachusetts, and Bayard Clark, a

4 citizen of the State of New Jersey, plaintiffs, by Stephen J. Field, their attorney, complain of James H. Suydam, a citizen of the State of New York, defendant, being in custody, &c., for that whereas the said plaintiffs heretofore, to wit, on the first day of May, in the year one thousand eight hundred and forty-five, were possessed of a certain piece or parcel of land, with the appurtenances, situated in the sixteenth ward of the city of New York, within the southern district of New York, of the value of three thousand dollars and upwards, which said piece or parcel of land, marked off and divided into two lots, is designated on a certain map entitled "map of lands in the sixteenth ward of the city of New-York, of the property of the heirs of Mary Clarke, deceased," made by George B. Smith, city surveyor, and dated April 6th, 1837, (a copy whereof is on file in the office of register of the city and county of New York,) by the number sixty-four (64) and sixty-five (65,) and bounded, taken together, as follows: beginning at a point on the northerly line of Twenty-fourth street distant two hundred feet westerly from the northwest corner of Ninth avenue and Twenty-fourth street;

5 running thence westerly along said northerly line fifty feet; thence northerly, parallel with Ninth avenue, ninety-eight feet nine inches to the middle of the block between Twenty-fourth and Twenty-fifth streets, and to a point equally distant from the two; thence easterly, parallel with Twenty-fourth street, fifty feet; thence southerly, parallel with Ninth avenue, ninety-eight feet nine inches to the place of beginning; which said premises the said plaintiffs claim in fee, the said Charles in right of the said Catherine, and the said Rupert in right of the said Isabella; and the said plaintiffs being so possessed thereof, the said defendant afterwards, to wit, on the second day of May, one thousand eight hundred and forty-five, entered into and upon the said premises and ejected the said plaintiffs therefrom, and unlawfully withholds from them the possession thereof. And also for that whereas the said Charles A. Williamson and Catherine H., his wife, heretofore, to wit, on the first day of May, one thousand eight hundred and forty-five, were possessed of one equal undivided third part of all that certain other piece or parcel of land, with the appurtenances, situated in the sixteenth ward of
6 the city of New York, within the southern district of New York, which said piece or parcel of land, marked off and divided into two lots as designated on a certain map entitled "map of lands in the sixteenth ward of the city of New York," within the southern district of New York, which said piece or parcel of land, marked off and divided into two lots, is designated on a certain map entitled map of lands in the sixteenth ward of the city of New York, the property of the heirs of Mary Clarke, deceased, made by George B. Smith, city surveyor, and dated April 6th, 1837, (a copy whereof is on file in the office of register of the city and county of New York,) by the numbers sixty-four (64) and sixty-five (65,) and bounded, taken together, as follows: beginning at a point in the northerly line of Twenty-fourth street distant two hundred feet westerly from the northwest corner of Ninth avenue and Twenty-fourth street; running thence westerly along said northerly line fifty feet; thence northerly, parallel with Ninth avenue, ninety-eight feet nine inches, to the middle of the block between Twenty-fourth and Twenty-fifth, and to a point equidistant from the two; thence
7 easterly, parallel with Twenty-fourth street, fifty feet; thence southerly, parallel with Ninth avenue, ninety-eight feet nine inches, to the place of beginning; which said equal undivided third part of the said premises the said Charles A. Williamson and Catharine H., his wife, claim in fee, the said Charles in right of the said Catharine; and the said plaintiffs being so possessed thereof the said defendants afterwards, to wit, on the second day of May, one thousand eight hundred and forty-five, entered into and upon the said equal undivided third part of the said premises, and ejected the said plaintiffs, Charles A. Williamson and Catharine H., his wife, therefrom, and unlawfully withholds from them the possession thereof. And also for that whereas the said Rupert J. Cochran and Isabella M., his wife, heretofore, to wit, on the first day of May, one thousand eight hundred and forty-five, were possessed of one equal un-

divided third part of all that certain other piece or parcel of land, with the appurtenances, situated in the sixteenth ward of the city of New York, within the southern district of New York, which
8 said piece or parcel of land, marked off and divided into two lots, is designated on a certain map entitled "map of lands in the sixteenth ward of the city of New York, the property of the heirs of Mary Clark, deceased," made by George B. Smith, city surveyor, and dated April 6th, 1837, (a copy whereof is on file in the office of register of the city and county of New York,) by the numbers sixty-four (64) and sixty-five (65,) and bounded, taken together, as follows: beginning at a point on the northerly line of Twenty-fourth street distant two hundred feet westerly from the northwest corner of Ninth avenue and Twenty-fourth street; running thence westerly along said northerly line fifty feet; thence northerly, parallel with Ninth avenue, ninety-eight feet nine inches to the middle of the block between Twenty-fourth and Twenty-fifth streets, and to a point equidistant from the two; thence easterly, parallel with Twenty-fourth street, fifty feet; thence southerly, parallel with Ninth avenue, ninety-eight feet nine inches, to the place of beginning; which said equal undivided third part of the said premises the said Rupert J. Cochran and Isabella M., his wife, claim in fee, in
9 right of the said Isabella, and being so possessed thereof the said defendants afterwards, to wit, on the second day of May, one thousand eight hundred and forty-five, entered into and upon the said equal undivided third part of the said premises, and ejected the said plaintiffs, Rupert J. Cochran and Isabella M., his wife, therefrom, and unlawfully withholds from them the possession thereof. And also for that whereas the said Bayard Clarke heretofore, to wit, on the first day of May, one thousand eight hundred and forty-five, was possessed of one equal undivided third part of all that certain other piece or parcel of land, with the appurtenances, situated in the sixteenth ward of the city of New York, within the southern district of New York; which said piece or parcel of land, marked off and divided into two lots, is designated on a certain map entitled "map of lands in the sixteenth ward of the city of New York, the property of the heirs of Mary Clarke, deceased," made by George B. Smith, city surveyor, and dated April 6th, 1837, (a copy whereof is on file in the office of register of the city and county of New York,) by the numbers sixty-four (64) and sixty-five (65,) and bounded,
10 taken together, as follows: beginning at a point in the northerly line of Twenty-fourth street distant two hundred feet westerly from the northwest corner of Ninth avenue and Twenty-fourth street; running thence westerly along said northerly line fifty feet; thence northerly, parallel with Ninth avenue, ninety-eight feet nine inches to the middle of the block between Twenty-fourth and Twenty-fifth streets, and to a point equidistant from the two; thence easterly, parallel with Twenty-fourth street, fifty feet; thence southerly, parallel with Ninth avenue, ninety-eight feet nine inches, to the place of beginning; which said equal undivided third part of said premises said Bayard Clarke claims in fee, and being so possessed thereof the

said defendant afterwards, to wit, on the second day of May, one thousand eight hundred and forty-five, entered into and upon the said equal undivided third part of the said premises, and ejected the said plaintiff, Bayard Clarke, therefrom, and unlawfully withholds him from the possession thereof, to the damage of the said plaintiffs, Charles A. Williamson and Catharine H., his wife, Rupert J. Cochran
11 and Isabella M., his wife, and Bayard Clarke, of two thousand dollars; and thereupon they bring suit, &c.

And the said James H. Suydam, defendant in this suit, by Henry P. Wanmaker, his attorney, comes and says he is not guilty of unlawfully withholding the premises claimed by the said Charles A. Williamson and Catharine H., his wife, Rupert J. Cochran, and Isabella M., his wife, and Bayard Clarke, plaintiffs in this suit, as alleged in the said declaration of the said plaintiffs; and of this the said defendant puts himself upon the country, and the said plaintiffs do the like, &c.

Wherefore the issue above joined is ordered to be tried at the circuit court of the United States of America for the southern district of New York, to be held at the City Hall in the city of New York, on the first Monday of October, one thousand eight hundred and forty-five.

And thereupon the process thereof is continued between the parties aforesaid of the plea aforesaid in this same court, before the judges thereof, until the first Monday of October, one thousand eight hundred and forty-five.

12 And hereupon the process thereof is continued between the parties aforesaid of the plea aforesaid in this same court, before the judges thereof, until the October term of this court, in the year one thousand eight hundred and sixty-four, and the
13 same day is given to the parties aforesaid, at the same place, at which said last-mentioned day, before the judges aforesaid, at the place last aforesaid, come as well the said Rupert J. Cochran and Isabella M., his wife, and Bayard Clarke, by their attorney aforesaid, as the said defendant, by his attorney aforesaid, and the said Charles A. Williamson and Catharine H., his wife, came not; and hereupon the said Rupert J. Cochran and Isabella M., his wife, give the court here to understand and be informed that after the last continuance of the plea aforesaid, and before this day, to wit, on the ninth day of May, 1849, at Edinburgh, in Scotland, the said Catharine H. Williamson died, and on the fourteenth day of May, in the same year, at Fort Leavenworth, in the State of Missouri, the said Charles A. Williamson also died, leaving surviving them as their only children and heirs-at-law William H.
14 Williamson, David R. Williamson, Mary *Mary* A. Williamson, Isabella Williamson, Catharine B. Williamson, and Charlotte A. Williamson, which allegations the said defendant doth not deny, but admits the same to be true. Wherefore let no further proceedings be had in this cause in the name of said Charles A. Williamson and Catharine H. Williamson, but let the same stand revived in the names of William H. Williamson, David R. Williamson, Margaret

Williamson, Isabella Williamson, Catharine B. Williamson, and Charlotte A. Williamson, Rupert J. Cochran, Isabella M., his wife, and Bayard Clarke, as plaintiffs; and thereupon the said plaintiffs come into court and substituted James S. Sluyter as their attorney in the place and stead of Stephen J. Field, their attorney aforesaid; and hereupon the issue above joined is ordered by the said court to be tried at the circuit court of the United States of America for
15 for the southern district of New York, in the second circuit, to be held at the City Hall, in the city of New York, in the said southern district of New York, on the first Monday of April, in the year one thousand eight hundred and fifty.

And since the substitution of the said James S. Sluyter as aforesaid, and in the year 18 , the said James S. Sluyter died, whereupon Dudley Field became the attorney for the parties plaintiffs hereto.

And the said defendant came into court and substituted N. Dane Ellingwood, as his attorney in the place and stead of Henry M. Wanmacker.

Afterwards, that is to say, on the ninth day of November, in this same term of October, 1864, before the Hon. Wm. D. Shipman, one of the judges of the said circuit court, came as well the abovenamed plaintiffs, as the abovenamed defendant, by their respective attorneys, above mentioned, and the jurors of the jury summoned to try
16 the said issue, being called, who come, who speak the truth of the matter above contained, being chosen, tried, and sworn, say upon their oaths that the said defendant is not guilty of unlawfully withholding the premises claimed by the plaintiffs, as alleged in the said declaration, and that they the said plaintiffs are not entitled to have or hold the same in fee, as claimed in the aforesaid declaration, and that the defendant is entitled to recover from the plaintiffs his costs and charges by him about this suit in this behalf expended. And thereupon it is adjudged by the court that the said defendant do recover against the said plaintiff the sum of 464 $\frac{15}{100}$ dollars for his costs and charges by the jury aforesaid, in form aforesaid, assessed, and that the said defendant have execution therefor.

Judgment signed this 27th Dec'r, 1865.

R. E. STILWELL, *Dep. Cl'k.*

Costs taxed by consent at $464 15.

DUDLEY FIELD, *Pl'ffs' Att'y.*

17 R. D. ELLINGWOOD,
Def't's Att'y by D. F.

Indorsed: W. H. Williamson and *als* ag'st James H. Suydam. Judgment record. Filed Dec. 27th, 1865.

18 *Bill of exceptions.*

At at a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit,

held at the City Hall in the city of New York, on the 9th day of November, in the year of our Lord one thousand eight hundred and sixty-four.

Present, the Hon. William D. Shipman, district judge.

WILLIAMINA H. WILLIAMSON, DAVID R. WILLIAMSON, MARY A. WILLIAMSON, ISABELLA WILLIAMSON, CATHARINE WILLAMSON, CHARLOTTE A. WILLIAMSON, RUPERT J. COCHRAN, ISABELLA M. COCHRAN, and BAYARD CLARKE, plaintiffs,

ag'st

JAMES H. SUYDAM, defendant.

Be it remembered that the issue joined in this action came on to be tried before the Hon. William D. Shipman, district judge
19 of the United States, holding the said circuit court at the City Hall in the city of New York, on the ninth day of November, 1864, and a jury duly empanelled and sworn. The plaintiffs to maintain the said issue on their part gave in evidence an exemplified copy of the will of Mary Clarke, deceased, duly proved in the supreme court of this State, in the words and figures set forth in the copy annexed hereto.

It was then proved on the part of the plaintiffs that Mary Clarke was seized and possessed of the premises described in said will as "all that part of my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line hereinbefore directed to be drawn from Greenwich road to Hudson river, twelve feet to the northward of the fence standing behind the house now occu-
20 pied by John Hall, bounded southerly by the said line, northerly by the lands of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox," at the time of making her will, and thence until her death, which took place in July, 1802; that the said premises including the lots claimed herein; that the said trustees, Benjamin Moore and Charity, his wife, and Elzabeth Maunsell, are all dead, the said Benjamin Moore having died on the 27th day of February, 1816, Elizabeth Maunsell before the year 1820, and Charity Moore on the 4th day of December, 1838; that Thomas B. Clarke was married in 1803; that his wife died in August, 1815, and himself on the 1st day of May, 1826; that he left three children surviving him, Catharine, Isabella, and Bayard, and that he had four other chil-
21 dren, all of whom died before him, without having had any children or having been married; that Catherine was born on the 5th of June, 1807, and was married to Charles A. Williamson on the 10th day of May, 1827; that Isabella was born on the 11th day of June, 1809, and was married to Rupert J. Cochran on the 4th day of June, 1835; that Bayard was born on the 17th day of March, 1815, all of whom were living at the commencement of this suit.

It was also proved that the defendant was in possession and the actual occupant of the premises at the commencement of this suit, on

the 13th of August, 1845, and that the two lots in question are located within the southern moiety, and also the western moiety as first divided, of the premises described in the said demise contained in the will of Mary Clarke, and that the premises claimed in this suit
22 are of greater value than two thousand dollars.

The plaintiffs thereupon rested.

The defendant then gave in evidence an act of the legislature of the State of New York, passed April 1st, 1814, whereof a copy is annexed hereto.

The defendant then gave in evidence a deed from Clement C. Moore to Thomas B. Clarke, dated February 21st, 1815, whereof a copy is annexed hereto.

The defendant then gave in evidence another act of the legislature of the State of New York, passed March 24th, 1815, whereof a copy is annexed hereto.

The defendant then gave in evidence two orders of the chancellor of the State of New York, dated, respectively, June 28, 1815, and July 3, 1815, whereof a copy is hereto annexed.

23 The defendant then gave in evidence a third act of the legislature of the State of New York, passed March 29, 1816, whereof a copy is hereto annexed.

The defendant then gave in evidence three orders of the chancellor of the State of New York, dated, respectively, May 30, 1816, March 8, 1817, and March 15, 1817, whereof a copy is hereto annexed.

The plaintiffs objected to each of the said orders as it was offered, but the court overruled the objection, and the plaintiffs duly excepted.

The defendant then offered in evidence a deed from Thomas B. Clarke to Peter McIntyre, dated Oct. 20, 1818. The plaintiffs objected; the court overruled the objection, and the plaintiff *and the plaintiff* duly excepted. The said deed was then read in evidence, whereof a copy is annexed hereto.

The defendant then offered in evidence an indorsement on
24 the said last-mentioned deed, a copy whereof is annexed hereto. The plaintiffs objected; the court overruled the objection, and the plaintiffs duly excepted. The said indorsement was then read in evidence.

The defendant then offered in evidence a certain deed from James A. Hamilton to Peter McIntyre. The plaintiffs objected; the court overruled the objection, and the plaintiffs duly excepted. The deed was then read in evidence, a copy whereof is hereto annexed.

The defendant then offered in evidence a deed from Peter McIntyre to Elijah Humphreys, dated Jan. 30, 1830. The plaintiffs objected; the court overruled the objection, and the plaintiffs duly excepted. The deed was then read in evidence, a copy whereof is annexed hereto.

25 The defendant then offered in evidence a deed from Philo T. Ruggles, master in chancery, to James H. Suydam, dated Feb'y 19, 1845. The plaintiffs objected; the court overruled tho ob-

jection, and the plaintiffs excepted. The deed was then read in evidence, a copy whereof is annexed hereto.

David A. Fowler was then examined as a witness for the defendant, and testified that there was formerly on file in the court of chancery certain papers in which the aforesaid orders of the chancellor purport to be founded, but he knows nothing of their genuineness, and they are lost.

The defendant then rested, and the court thereupon ruled that the defendant was entitled to the verdict; to which ruling the plaintiffs duly excepted.

26 The court then directed the jury to render a verdict for the defendant; to which direction the plaintiffs duly excepted.

The jury thereupon, under the direction of the court, rendered a verdict for the defendant.

And because none of the said exceptions so offered and made to the opinion and decision of the said district judge do appear upon the record of the said trial, therefore, on the prayer of the said plaintiffs, by their counsel, the said district judge hath to this bill of exceptions put his seal, according to the statute in such case made and provided, this 4th day of February, in the year one thousand eight hundred and sixty-five.

W. D. SHIPMAN, *Judge.*

Indorsed: Circuit court, U. S. Williamina H. Williamson and *als.* *vs.* James H. Suydam. Bill of exceptions. Dudley Field, sol'r for pl'ff. Filed Feb'y 13, 1865.

APPENDIX.

27 *Exhibit A.—Will of Mary Clarke.*

In the name of God, amen! I, Mary Clarke, of the city of New York, widow and relict of Thomas Clarke, late of the same place, gentleman, at present of sound and disposing mind and memory, for which I bless God, do make, publish, and declare this my last will and testament in manner following, that is to say: I will that all such debts as I shall justly owe at the time of my decease, and my funeral charges and expenses, be first paid by my executors hereinafter named. And as to my estate, real and personal, I dispose thereof as follows: First, I give and devise unto the Reverend Benjamin Moore and Charity, his wife, and to their heirs, in fee, all that certain dwelling-house and that part of the farm whereon I now live at Greenwich, called Chelsea, and all the buildings and improvements thereon erected, bounded southerly by the land of said Benjamin Moore, easterly by the highway called Greenwich road, and northerly by a line to be drawn, commencing at a point in the said road twelve feet to the north of the intersection of the fence which now stands behind the house occupied by John Platt, and to run as nearly parallel to the said fence as a straight line down to Hudson's river will permit, so as to strike a cedar just planted in the ground, not far from high-water

mark, and westerly by the Hudson aforesaid. To have and to hold the said hereby described premises, with the appurtenances, to the said Benjamin Moore and Charity, his wife, and to their heirs, in fee. Also I give and devise unto the said Benjamin Moore and Charity, his wife, the one equal undivided half part of my salt meadow, situate at a place called Harga, on Jersey shore, in the county of Bergen, to hold the same to them and their heirs in fee. I give and bequeath unto the said Benjamin Moore all my farming utensils of every description, and all my carriages, both for pleasure and for service, my horses and cattle of every description. And also all my slaves, to wit, Thomas and Ann, his wife, Charles and Hester. I give and bequeath to my daughter Charity all my furniture and wearing apparel. Item. I give and devise unto my grandson, Clement C. Moore, son of the Rev. Benjamin Moore, twelve hundred acres of land, situate in the patent of Kayaderosseras, with the appurtenances, the same now being divided into good farms, and under lease to different tenants, on the counterparts of whose leases I have written his name as designating particularly that part of the said patent included in this devise. To have and to hold the said twelve
28 hundred acres and premises, with the appurtenances, to the said Clement C. Moore, and to his heirs, in fee. Item. I give and devise to the said Clement C. Moore one other lot, a farm situate in the said patent and distinguished by lot number nine in the thirtieth allotment of the said patent, containing one hundred and six acres. To hold the same to the said Clement C. Moore and to his heirs in fee. Item. I give and devise unto the said Clement C. Moore and Thomas B. Clarke, a natural son of my son Clement, and to their heirs, all those four certain lots of land situate in the said patent, containing in the whole two thousand seven hundred and seventy-seven acres, of which there is contained in the eighteenth allotment of the said patent five hundred acres, in the thirtieth allotment five hundred and thirty-seven acres and a half, and in the twenty-fourth allotment one thousand two hundred and thirty-four acres, and in the twenty-fifth allotment five hundred and five acres and a half; to hold the same to them, the said Clement C. Moore and Thomas B. Clarke, and to their heirs, in fee. Item. I give and devise unto the said Benjamin Moore and Charity, his wife, and to Elizabeth Maunsell, and their heirs forever, as joint tenants, and not as tenants in common, all that certain lot of land number eight in the said thirtieth allotment of the said patent, containing one hundred acres; also all that part of my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line hereinbefore directed to be drawn from the Greenwich road to the Hudson river, twelve feet to the northward of the fence standing behind the house now occupied by John Hall, bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease of Robert Lenox; also all my house and lot, with the appurtenances, known by number seven within the limits of the prison, and now occupied by Thomas Byron; to have and to hold the

said hereby devised premises to the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them and the heirs of such survivor, as joint tenants, and not as tenants in common, in trust to receive the rents, issues, and profits thereof. and to pay the same unto the said Thomas B. Clarke, natural son of my late son Clement, during his natural life, and from and after the death of the said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke living at his death, in fee, and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then in the further trust and confidence to convey the said hereby devised premises to my said grandson, Clement C. Moore, and to his heirs, or to such person, in fee, as he may by will appoint, in case of his death prior to the death of the said Thomas B. Clarke. Item. I give and demise unto the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to their heirs forever, as joint tenants, and not as tenants in common, six hundred acres of land, with the appurtenances, situate in the said patent of Kayaderos-
29 seras and divided into farms now under lease to different tenants, on the counterpart of whose leases I have marked the name of Clement Clarke, so as to designate the lots hereby devised; also all that lot on the opposite side of Greenwich road now in the possession of Mr. Turner; also the wood lot adjoining the same, the said two lots containing about thirty acres in the whole; to hold the said hereby devised premises to them, the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to the survivors, or survivor of them and the heirs of such survivor, as joint tenants and not as tenants in common, in trust to receive the rents, issues, and profits thereof, and to pay the same to Clement Clarke, a natural son of my late son Clement, during his natural life, and from and after the death of the said Clement, in further trust and confidence, to convey the same to the lawful issue of the said Clement living at his death, and in case the said Clement should die without leaving lawful issue, then on the further trust and confidence to convey the same to my grandson Clement, son of the said Benjamin Moore, and to his heirs, in fee, or to such person as he may by will appoint, in case of the death of the said Clement Moore prior to that of the said Clement Clarke. Item. I give and devise unto the said Benjamin Moore and Charity, his wife, and Elizabeth Maunsell, and to their heirs forever, as joint tenants and not as tenants in common, all that house and lot of ground situate in Hague street, in the city of New York; also all that lot of land situate in the patent of Kayaderosseras, and lying on the Mohawk river, in the possession of one Northrup; also the lot of land situate in the said patent, in the possession of Hacaleah Foster; also seven hundred and fifty-one acres of land lying in the twenty-third allotment of the patent aforesaid; also six hundred acres divided into farms, now leased to different tenants, on the counterparts of whose leases I have indorsed the name of Samuel Clarke, so as to designate the farms included in this devise of six hundred acres; to hold the same to the said Benjamin Moore and Charity his wife, and

Elizabeth Maunsell, and to the survivors or survivor of them and to the heirs of such survivor, as joint tenants and not as tenants in common, in trust to receive the rents, issues, and profits thereof, and to pay the same to Samuel Clarke, a natural son of my late son Clement, during his natural life, and from and after his death in the further trust and confidence, to convey the same in fee to such lawful issue of the said Samuel as he may leave at the time of his death, and if the said Samuel shall die without leaving lawful issue living at the time of his death, then in the further trust to convey the same in fee to the said Clement Moore, son of the said Benjamin Moore, and to his heirs, in fee, or to such person as he may by will appoint, in case of his death prior to that of the said Samuel Clarke. Item. I give and bequeath unto Charity Clarke, natural daughter of my late son Clement, fifty-five pounds, to be paid quarterly, and continued annually until she marries; the rent proceeding from the lots leased to
30 Mr. Turner and John Platt, to be applied to this purpose. Also I give and bequeath unto her five hundred pounds, to be paid at her marriage or arrival at full age, whichever event may first happen. It is also my will that she be maintained frugally out of the moneys now at interest, and that a fund be kept for that purpose by my executors until her marriage or arrival at full age as aforesaid. Item. I give and bequeath unto Mary, natural child of my late son Clement, the annual sum of fifty pounds, and a frugal maintenance out of the moneys now at interest, and that a fund be kept by my executors for that purpose until her marriage. Also I give her the sum of five hundred pounds, to be paid at her marriage or arrival at full age, whichever event may first happen. Item. I give and bequeath unto the said Thomas B. Clarke one thousand pounds, to be paid to him within three months after my decease. Item. I give and bequeath unto my daughter Mary, wife of Sir Gilbert Affleck, one thousand and five hundred pounds sterling, to be paid in one year after my decease. It is my further will that Richard, my slave, be manumitted by my executors on his arrival at full age, and that in the meantime he be put out to learn some trade, and be supported out of my estate during such his service. I do further direct that Rachel, my slave, be sold immediately, after my decease by my executors, and all the rest, residue, and remainder of my estate, real and personal, of what nature soever and wheresoever not before herein disposed of, I give, devise, and bequeath unto the said Clement Moore, and to the said five children of my son Clement, and to their heirs, executors, and administrators forever, as tenants in common, equally to be divided between them, share and share alike, at such times as my executors may think discreet. And lastly, I do hereby nominate, constitute, and appoint my son-in-law, the Reverend Benjamin Moore and Charity, his wife, their son, the said Clement C. Moore, Elizabeth Maunsell, and the said Thomas B. Clarke, executors and executrixes of this my last will and testament, hereby revoking all former and other wills by me made.

In witness whereof, I, Mary Clarke, the testatrix, have to this my last will and testament, consisting of two sheets of paper, set my hand

and seal this sixth day of April, in the year of our Lord one thousand eight hundred and two.

MARY CLARKE. [L. S.]

Signed, sealed, published, and declared by the said Mary Clarke within named, as and for her last will and testament, in the presence of us, who, in her presence and at her request, have hereunto set our names as witnesses—the name "Moore" between the eighteenth and nineteenth lines, fourth page, and the words "be paid," between the twelfth and thirteen lines, seventh page, being interlined.

THOMAS SALTER.
J. B. PROVOST.
PETER DAYTON.

B.—Act of April 1, 1814.

Whereas Mary Clarke, late of the city of New York, deceased, widow, and relict of Thomas Clarke, late of the same place, gen-
31 tleman, deceased, in and by her last will and testament, bearing date the sixth day of April, in the year of our Lord one thousand eight hundred and two, did, among other things, devise unto Benjamin Moore and Charity, his wife, and to Elizabeth Maunsell, and to their heirs forever, certain lands and real estate; to have and to hold to the said Benjamin Moore and Charity, his wife, and to the said Elizabeth Maunsell, and to the survivors or survivor of them, and to the heirs of such survivor, as joint tenants and not as tenants in common, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, one of the devisees of the testatrix, during his natural life, and from and after the death of the said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke living at his death, in fee; and if the said Thomas B. Clarke should not have any lawful issue at the time of his death, then in the further trust and confidence, to convey the said devised premises to Clement C. Moore, also one of the devisees of the said testatrix, and to his heirs, or to such person, in fee, as he might by will appoint, in case of his death, prior to that of the said Thomas B. Clarke. And whereas it appears to the legislature that the property so devised as aforesaid is nearly unproductive, and, in its present situation, is incapable of being improved so as to yield an adequate income for the maintenance and support of the said Thomas B. Clarke and his family, whereby the benevolent intentions of the testatrix will be defeated, without the interposition and aid of the legislature. And whereas the said Benjamin Moore and Charity, his wife, and the said Elizabeth Maunsell, the said trustees named in the said will, in and by a certain instrument under their hands and seals, bearing date and duly executed by them on the eleventh day of January last, did consent and agree to all such acts as the legislature of this State should deem meet and proper to make for the benefit and relief of the said Thomas B. Clarke, or of his issue, heirs and assigns, in and concerning the premises; and also did by the said instrument in writing consent and desire that some other person or persons might be substituted for them in their place

and stead, as trustees aforesaid, and they be discharged from the said trust. And whereas Clement C. Moore, the person named in the said will, and entitled to the contingent remainder, hath, by a certain other instrument in writing, under his hand and seal, bearing date and duly executed by him on the said eleventh day of January last, consented and agreed to all such act or acts as the legislature might deem proper to make for the benefit and relief of the said Thomas B. Clarke: therefore

I. *Be it enacted by the people of the State of New York, represented in senate and assembly*, That it shall and may be lawful for the court of chancery, on the application of the said Thomas B. Clarke, to constitute and appoint one or more trustees to execute and perform the several trusts and duties specified
32 and set forth in the said in part recited will and testament and in this act, in the place and stead of the said Benjamin Moore and Charity, his wife, and the said Elizabeth Maunsell, who are hereby discharged from the trusts in the said will mentioned. Provided, that it shall be lawful for the said court at any time thereafter, as occasion may require, to substitute and appoint other trustee or trustees in the room of any of those appointed in this act, in like manner as is practised in the said court in cases of trustees appointed therein; and such trustee or trustees so appointed are hereby vested with the like powers as if he and they had been named and appointed in and by this act.

II. *And be it further enacted*, That the trustees appointed or to be appointed by or under the authority of this act, or the major part of them, shall, as soon as conveniently may be, partition and divide all that certain tract of land described in the last will and testament, as follows, viz: "All that part of my said farm at Greenwich aforesaid, called Chelsea, lying to *to* the northward of the line hereinbefore directed to be drawn from the Greenwich road to the Hudson's river, twelve feet to the northward of the fence standing behind the house now occupied by John Platt, bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox," into two equal parts, one moiety whereof shall be held by them to the uses and upon the trusts declared in and by the said will, and the remaining moiety shall be subdivided by the said trustees, or the major part of them, into so many lots as they, or the major part of them, may think most likely to effect an advantageous sale thereof; and after having completed such subdivision, the said trustees, or a major part of them, are hereby authorized and required, within a convenient time thereafter, not to exceed six months, except at the request of the said Thomas B. Clarke, to sell and dispose of the said last-mentioned subdivided moiety; and also that certain house and lot described in the said last will and testament as follows, viz: "All my house and lot, with the appurtenances, known by number seven, within the limits of the prison, and now occupied by Thomas Byron," in such manner and upon such terms as they, or a major part of them, may deem best for the interest

of the several parties interested therein, and thereupon to make and execute good and sufficient deeds or conveyances in the law to the purchaser or purchasers thereof, which deeds or conveyances shall operate to convey to the said purchaser or purchasers, respectively, all the estate, right, and title and interest which the said Mary Clarke had at the time of her death in and to the said premises.

III. *And be it further enacted*, That the said trustees, or a major part of them, within a convenient time after the said sale, for the purpose of securing the principal of the proceeds thereof, to the uses to and according to the trust declared in and by the
33 said will, and for the further purpose of creating an income for the benefit and support of the said Thomas B. Clarke, his family and children, shall invest the said proceeds in any public stock of the United States or of this State, or bank stock, or shall put the same out at interest on real security from time to time, as they, or a majority of them, shall deem most for the interest of the parties concerned therein; and the said trustees, or a majority of them, shall, out of the interest or income of the said proceeds, in the first place, set apart and reserve for the first four years eight hundred dollars a year, and from and after the expiration of the said four years, one thousand dollars a year, during the natural life of the said Thomas B. Clarke, which said annual reservations, together with the interest thereof, from time to time accruing, are to be invested in stock, or put out on real security by the said trustees, or a majority of them, for the purpose of creating an accumulating fund, at a compound interest, during the life of the said Thomas B. Clarke, for the benefit of his children after his decease, when the same is to be disposed of by the said trustees, or a majority of them, to the uses, according to the trusts declared in and by the said last will and testament, and the residue of the said income that may remain from year to year, after making the reservations aforesaid, shall be paid by the said trustees, or a major part of them, to the said Thomas B. Clarke, for his use and benefit, and for the maintenance of his family and education and support of his children.

IV. *And be it further enacted*, That the said principal sum of money arising from the said sales, and by this act directed to be vested or put out at interest aforesaid, shall be held by the said trustees, or the major part of them, according to the said will; that is to say, in trust to be assigned or paid over to the lawful issue of the said Thomas B. Clarke, living at his death; and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then to be assigned or paid over to Clement C. Moore, or his representatives, or to such person as the said Clement C. Moore may, by will, appoint, in case of his death prior to that of the said Thomas B. Clarke.

V. *And be it further enacted*, That it shall and may be lawful for the said trustees, or a major part of them, during the natural life of the said Thomas B. Clarke, from time to time, to demise and let for the best rents that can be procured, and to such person or persons, with such covenants and upon such terms, limitations, and conditions as the said trustees, or the major part of them, shall think expedient.

all or any part or parcel of the land first above mentioned in the second section of this act, for and during any term of years not exceeding twenty-one, and to renew such leases or demises, to take effect from the date and execution thereof, and not in future or remainder, if such trustees, or the major part of them, shall judge proper, and to collect and receive the rents and profits thereof, and to pay the same over to the said Thomas B. Clarke, as they shall be re-
34 ceived for and during his natural life. Provided, that no lease shall be made, executed, or renewed under this section, but by the approbation and consent of the said Thomas B. Clarke. And provided further that upon the death of the said Thomas B. Clarke, the unexpired term or terms of any such leases shall be held by the trustees, or a major part of them, in trust, for the uses and purposes mentioned in the said before in part recited will, and none other, and to be deemed part and parcel of the estate thereby devised, according to the true intent and meaning of the said will.

VI. *And be it further enacted*, That in every case not otherwise provided for by this act the trustees appointed or to be appointed in virtue thereof, shall be deemed and adjudged trustees under the said will, so far as relates to the premises mentioned and described in the recital to this act, in like manner as if such trustees had been originally named and appointed in the said will, and they shall, in all respects, be liable to the power and authority of the court of chancery for or concerning the trusts created by this act.

C.—Deed of Clement C. Moore.

This indenture, made the twenty-first day of February, in the year of our Lord one thousand eight hundred and fifteen, between Clement C. Moore, of the city and county of New York, gentleman, of the first part, and Thomas B. Clarke of the same place, gentleman, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, to him in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, and forever quit-claimed, and by these presents doth grant, bargain, sell, remise, release, and forever quit-claim unto the said party of the second part, his heirs and assigns forever, all the estate, right, title, interest, property, claim and demand whatsoever of him, the said party of the first part, of, in, and to all those certain tracts, pieces, or parcels of land described in the last will and testament of Mary Clarke, late of the city of New York, widow, deceased, as follows, viz: "All that part of my said farm at Greenwich aforesaid, called Chelsea, lying to the northward of the line hereinbefore directed to be drawn from the Greenwich road to the Hudson's river, twelve feet to the northward of the fence standing behind the house now occupied by John Platt, bounded southerly by the said line, northerly by the land of Cornelius Ray, easterly by the Greenwich road, and westerly by the Hudson, including that part of my said farm now under lease to Robert Lenox; and also all my house and lot, with the appurtenances, known by number

seven, within the limits of the prison, and now occupied by Thomas Byron;" as by the said last will and testament bearing date the sixth day of April, one thousand eight hundred and two, or the record thereof, in the office of the clerk of the supreme court, will more fully appear, together with all and singular the appurtenances. To have and to hold the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use of the said party of the second part, his heirs and assigns forever.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

CLEMENT C. MOORE. [L. S.]

Sealed and delivered in the presence of—
BEV. ROBINSON.

CITY AND COUNTY OF NEW YORK, *ss:*

Personally appeared before me, James A. Hamilton, master in chancery in and for the State of New York, this twenty-second day of February, in the year one thousand eight hundred and fifteen, Beverly Robinson, to me personally known, who, being sworn, deposed that he saw Clement C. Moore (to him well known to be the person described in the within instrument) execute the same as his voluntary act and deed, and that the said deponent subscribed his name as a witness to the same. All which being satisfactory to me, I do allow it to be recorded.

JAMES A. HAMILTON, *Master in Chancery.*

Recorded February 28th, 1815, at noon, and agrees with the original compared therewith by—

ARCH'D CAMPBELL, *Dep. Secretary.*

D.—Act of March 24, 1815.

An act supplemental to the "Act for the relief of Thomas B. Clarke," passed April 1, 1814.

Whereas, since the passing of the act entitled "An act for the relief of Thomas B. Clarke," Clement C. Moore, in the said act named, by an indenture duly executed by him, and recorded in the office of the secretary of this State, and bearing date the twenty-first day of February, in the year one thousand eight hundred and fifteen, hath, for the consideration therein expressed, and in due form of law, released and conveyed unto the said Thomas B. Clarke, his heirs and assigns forever, all the estate, right, title, interest, property, claim, and demand whatsoever, of the said Clement C. Moore, of, in, and to the real estate mentioned in the said act, whereby the said real estate became exclusively vested in the said Thomas B. Clarke and his children; and whereas the said Thomas B. Clarke hath prayed the legislature to alter and amend the said act, particularly in relation

to the interest of the said Clement C. Moore and the execution of certain of the trusts in the said act mentioned. Therefore—

I. *Be it enacted by the people of the State of New York represented in senate and assembly,* That all the beneficial interests and estate
36 of the said Clement C. Moore, or those under him, arising or to arise by virtue of the act to which this is a supplement, or by the will mentioned in the said act, shall be, and the same is hereby, vested in the said Thomas B. Clarke, his heirs and assigns; and so much of the act to which this is a supplement as is repugnant thereto, and so much thereof as requires the trustees to set apart and reserve a certain annual stipend out of the interest or income of the property thereby directed to be sold for the purpose of creating an accumulating fund at compound interest during the life of the said Thomas B. Clarke, and so much of the said act as requires the several duties therein enumerated to be performed by trustees to be appointed by the court of chancery, as therein mentioned, be, and the same is hereby repealed.

II. *And be it further enacted,* That the said Thomas B. Clarke be, and is hereby, authorized and empowered to execute and perform every act, matter, and thing in relation to the real estate mentioned in the act to which this is a supplement, in like manner and with like effect that trustees duly appointed under the said act might have done, and that the said Thomas B. Clarke apply the whole of the interest and income of the said property to the maintenance and support of his family and the education of his children.

III. *And be it further enacted,* That no sale of any part of the said estate shall be made by the said Thomas B. Clarke until he shall have procured the assent of the chancellor of this State to such sale, who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke, as trustee; and further, that it shall be the duty of the said Thomas B. Clarke annually to render an account to the chancellor, or to such person as he may appoint, of the principal of the proceeds of such sale only, the interest being to be applied by the said Thomas B. Clarke, in such manner as he may think proper, for his use and benefit, and for the maintenance and education of his children. And if, on such return, or at any other time, and in any other manner, the chancellor shall be of opinion that the said Thomas B. Clarke hath not duly performed the trust by this act reposed in him, he may remove the said Thomas B. Clarke from his said trust and appoint another in his stead, subject to such rules as he may prescribe in the management of the estate hereby vested in the said Thomas B. Clarke as trustee.

E.—Order of reference.

At a court of chancery held for the State of New York, at the City Hall of the city of New York, on the 28th day of June, in the year of our Lord one thousand eight hundred and fifteen.

Present, the honorable James Kent, esq., chancellor.

In the matter of the petition of Thomas B. Clarke, under the
37 acts of the legislature herein mentioned.

On reading the petition in this matter, praying for the assent of the chancellor to the sale of the premises in the said petition mentioned, and in and by the acts of the legislature of the State passed on the first day of April, in the year of our Lord one thousand eight hundred and fourteen, entitled "An act for the relief of Thomas B. Clarke," and the act supplementary thereto, in the said petition mentioned, for the objects and purposes in the said last-mentioned act and the petition mentioned, and for the direction of the chancellor, for the application of so much of the proceeds of the said sales as may be necessary to and for the payment of the debts of the petitioner in the said petition mentioned, and of the mode in which the residue of the said proceeds shall be vested in the petitioner as trustee, made in pursuance of the supplemental act aforesaid, and the affidavit of the petitioner of the truth of the facts set forth in his said petition, which petition and affidavit being filed, on motion of Mr. S. Jones, jr., of counsel for the petitioner, it is ordered that it may be referred to one of the masters of this court to examine into the allegations and matters in the said petition set forth and contained, and to report thereon to this court with all convenient speed, and that all directions be reserved until the coming in of the said report.

F.—Order of the chancellor, July 3, 1815.

At a court of chancery held for the State of New York, at the city of New York, on the third day of July, in the year of our Lord one thousand eight hundred and fifteen.

Present, the honorable James Kent, esq., chancellor.

In the matter of the petition of Thomas B. Clarke, under the acts of the legislature therein mentioned.

The petitioner having presented his petition to the chancellor, in substance setting forth, among other things, the devise of a certain house and lot of land in the fifth ward of the city of New York, and certain land and premises in the ninth ward of the said city, in the said petition more particularly mentioned, by Mary Clarke, therein mentioned, by her last will and testament, to certain trustees therein named, upon trust to receive the rents and profits thereof, and pay the same to the petitioner, during his natural life, and from and after his decease to convey the said premises to his lawful issue living at his death, in fee; and if he, the petitioner, should not leave any lawful issue at the time of his death, then to convey the same to Clement C. Moore, in the said will named, and his heirs, or such person in fee as he might by will appoint in case of his death prior to that of the petitioner; the release and conveyance by the said Clement C. Moore of all his estate, right and interest, claim and demand, in and to the said devised premises to the petitioner, and the parts and provisions of and in the act entitled "An act for the relief of Thomas B. Clarke,"

and an act supplementary thereto, in the said petition in substance recited, by the first of which acts, viz: the act entitled "An
38 act for the relief of Thomas B. Clarke," passed on the application of the petitioner and with the consent of the trustees in the will aforesaid named, and of the said Clement C. Moore, before the said release and conveyance by the said Clement C. Moore of his estate and interest in the said devised premises to the petitioner, the said trustees in the will aforesaid named were, with their assent, discharged from the said trust, and an authority given to this court to constitute and appoint one or more trustees in their place and stead, on the application of the petitioner, to execute and perform the several trusts and duties in the said will, and in that act expressed and contained, and in and by which said act the trustees to be appointed under the authority thereof, or a major part of them, were directed to divide the said premises at Greenwich, in the ninth ward of the city of New York, into two equal parts, one moiety thereof to remain in trust, and the remaining moiety to be subdivided into suitable lots for the advantageous sale thereof, and the same when so subdivided, and also the said house and lot in the fifth ward of the city of New York, to be sold and disposed of, and conveyances executed and given for the same to the purchasers thereof, and the nett proceeds thence arising to be put out and invested as authorized by the said act, and a given part of the interest and income of the said proceeds to be annually in the first place set apart, reserved, and invested during the natural life of the petitioner, to create an accumulating fund for the benefit of those in remainder, being the lawful issue of the petitioner living at the time of his death, or, in default of such issue, to the said Clement C. Moore, and the residue of the said interest for his use and benefit and the support of his family and education of his children, and the principal of the said proceeds to be held and disposed of by the trustees according to the trusts of the will aforesaid in that behalf, and in and by which said supplemental act, passed subsequently to the release and conveyance of the said Clement C. Moore of his estate and interest in and to the said premises to the petitioner, all the beneficial interest and estate of the said Clement C. Moore and those under him, arising or to arise by the said first-mentioned act or the said will mentioned therein, so as vested in the petitioner, his heirs and assigns, and by which said supplemental act, the parts and provisions therein specified of the first-mentioned act were repealed; and he, the petitioner, was authorized and empowered to execute and perform every act, matter, and thing in relation to the real estate mentioned in the said original or first-mentioned act, in like manner and with like effect that the trustees duly appointed under the said act might have done, and to apply the whole of the interest and income of the said property to the maintenance of his family and the education of his children; but it was further provided and enacted that no sale of any part of the said estate should be made by the petitioner until he should have procured the assent of the chancellor of this State to such sale;

who should, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he should think proper, should be vested in the petitioner as trustee; and the said petitioner further setting forth in and by his said petition that he has a large and expensive family, consisting besides himself of a wife and six children, the oldest between eleven and twelve years of age, and the youngest under one year; that the rents and profits and income of the said trust premises are the sole resource and dependence of him, the petitioner, for the maintenance and support of himself and his family and the education of his children, several of whom are of ages that require a considerable annual expenditure therein; that the said trust premises are under the leases, on the several parts and parcels thereof, in the said petition mentioned, and that the rents, profits, and income thereof are inadequate to the purpose aforesaid, and have been inadequate thereto ever since the marriage and settlement in life of him, the petitioner, and that to supply the deficiency, which has been continually increasing, and provide and procure the necessary means and funds for the support of himself and his family, he has been reduced to the necessity of contracting and incurring debts, and that for those purposes, and the discharge of other demands against him, he borrowed of the president and directors of the Manhattan Company the sum of four thousand and four hundred dollars in the year one thousand eight hundred and five, and has subsequently contracted other debts, by purchases on credit of articles of indispensable necessity for himself and his family, and by borrowing moneys to be applied, and which he has applied, to the same purpose, and that his own necessities and the interest and welfare of his family require that sale should be made of what was authorized and directed by the herein first-mentioned act to be sold of the said trust premises, and so much of the proceeds as might be necessary applied to the payment of the said debts of the petitioner, and the residue vested in him as trustee, under the supplemental act aforesaid, for the purposes therein mentioned; and that he, the petitioner, expected to be able to obtain the consent of the lessees of nearly the whole of the eastern moiety of the said premises at Greenwich, to be divided by the line in the said petition mentioned and described, to the sale thereof, free and discharged from the lease thereof, and praying the chancellor to give his assent to and authorize the sale by the petition of the said eastern moiety of the said premises at Greenwich, or such other moiety thereof as the chancellor might be pleased to designate and direct, and also of the said house and lot in the said fifth ward of the city of New York, for the objects and purposes in the said petition mentioned, and by the acts aforesaid authorized and contemplated, and to give such directions for and touching the said sale as he might deem meet and proper, and further praying the chancellor to authorize, order, and direct that so much of the nett proceeds of such sales as might be necessary for the purpose should be appropriated and applied to the payment and discharge of the said debts so contracted and incurred by him, the petitioner, for the pur-

poses aforesaid, and the residue thereof vested in the name of him, the petitioner, as trustee as aforesaid, in such mode as the chancellor should direct, in and upon such good productive stocks or funds of a permanent nature, or on interest upon real security, or otherwise as might be directed by the chancellor; and it having been referred by this court, by an order made in this matter on the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and fifteen, to one of the masters of this court, to examine into the allegations and matters in the said petition set forth and contained, and to report thereon, and Theodorus V. W. Varick, esquire, one of the masters of this court, having, in pursuance of the said order of reference, made a report in the premises to this court, whereby it appears that he, the said master, has examined into the matters and allegations set forth in the said petition, as he was directed by the said order to do, and found the same to be true, and that the petitioner is indebted over and above the said debt of four thousand four hundred dollars to the Manhattan Company aforesaid, to the amount of five thousand four hundred dollars and upwards, and that he is not engaged in any profession or occupation, and is greatly embarrassed by his said debts; and further, that the said trust premises are under the several leases thereof in the said report particularly specified, and that it satisfactorily appeared to him, the said master, that the rents and profits of the said trust estate are not, and, from the local situation and state of improvement thereof, and of the said premises at Greenwich in particular, even if unincumbered by the present leases thereof, would not be made adequate or sufficient for the support of the petitioner and his family and the education of his children, even if the whole of the said rents and profits could be applied thereto, and that the same, after paying thereout the interest of the said debts of the petitioner, would be insufficient for the reasonable and proper support of the petitioner and his family, according to their situation in life, and would admit of no provision or allowance for the education of the children of him, the petitioner; and it further appearing by the said report that nearly the whole of the said eastern moiety of the said premises at Greenwich, in the ninth ward of the city of New York, to be divided by the line in that behalf mentioned in the said petition, is included in a lease by way of mortgage, executed by the petitioner, as attorney for the trustees, in the will aforesaid named, of and upon the premises described, to the president and directors of the Manhattan Company aforesaid, for the term of twenty-one years, from the fifteenth day of July, one thousand eight hundred and five, for the purpose of securing to the said company the payment of the aforesaid debt or sum of four thousand four hundred dollars, borrowed of them by the petitioner aforesaid, with interest for the same, and that the said president and directors
41 of the said company are willing, and will consent that the said leasehold premises be sold, free and discharged from their said lease thereof, and unincumbered thereby, on condition that said debt of the petitioner to the said company, with the interest thereof, be first paid, or satisfactorily secured to the said company, by and out of the

proceeds of such sale, and that the proper directions be given for that purpose, in the order to be made by the court, in the premises; which report is filed: Therefore, on motion of Mr. S. Jones, junior, of counsel for the petitioner, it is ordered that the assent of the chancellor be, and hereby is, given to the sale, by the petitioner, of the said house and lot in the fifth ward of the city of New York, and of the eastern moiety or half part of the said premises at Greenwich, in the ninth ward of the city of New York, to be divided by the line in the manner for that purpose mentioned in the said petition; and the petitioner is authorized and directed to sell and dispose of the same, under and according to the aforesaid acts of the legislature, in that behalf, the said sales to be made under the direction of one of the masters of this court, and the petitioner to proceed in making the sales and conveyances of the said premises so to be sold in the manner for that purpose in and by the said acts prescribed and directed. And it is further ordered, that the purchase moneys for the said premises so to be sold be paid by the purchasers to the said master, to be disposed of by him as hereinafter directed. And it is further ordered and directed, and his honor the chancellor hereby doth authorize, order, and direct, that so much of the nett proceeds to arise from such sales as may be necessary for the purpose be applied, under the direction of one of the masters of this court, in and for the payment and discharge of the debts now owing by the petitioner, and to be contracted for the necessary purposes of his family, to be proved before the said master, and the costs, charges, and expenses of the petitioner on his petition in this matter, and the proceedings had, and to be hereafter had, under or in consequence thereof, but so, however, and it is further ordered and directed, that the nett proceeds of the said eastern moiety of the said premises at Greenwich aforesaid, or so much thereof as shall be necessary for that purpose, be applied in the first place, and before and in preference to any other appropriation or application thereof, to pay and satisfy to the president and directors of the Manhattan Company aforesaid the aforesaid debt or sum of four thousand four hundred dollars, with the interest thereof up to the time of such payment, or such part and balance of the said debt and interest as shall not have been otherwise paid or satisfied. And it is further ordered and directed, and his honor the chancellor hereby doth further order and direct, that the residue of the said nett moneys and proceeds arising from such said sales after the said debts, costs, charges, and expenses shall be discharged and paid by and out of the same, be placed out at interest, on real security in the city of New York, in the name of the petitioner
42 as trustee, under the direction of one of the masters of this court, upon the following trusts, to be expressed upon the face and in the body of the said securities respectively, whereon the same shall be so placed, that is to say: upon trust, that the interest and income thereof, or so much of the same as may be required for that purpose, be applied from time to time in and for the suitable and proper maintenance and support of the petitioner and his wife and children already born, and to be hereafter born, according to

their situation in life, and for the suitable education of the said children; and upon further trust, that the principal sum or sums, with the securities whereon the same may be vested or placed, and may stand, shall be held, and he, the petitioner, as trustee, stand and be possessed thereof, in trust for the benefit of the lawful issue of the petitioner, who shall be living at the death of him, the petitioner, according to the trusts upon which the unsold moiety of the said premises at Greenwich aforesaid, in the aforesaid acts of the legislature mentioned, are or shall be held, and so and in such manner that the said interest and income of the said trust moneys, funds, and securities, or so much thereof as may be requisite thereto, shall be appropriated, applied, and secured in the first instance and exclusively to the suitable maintenance of the family of the petitioner according to their situation in life, and the suitable education of his children, and shall not be subject or liable to or for the engagements, debts, or control of the petitioner, or for any other purpose whatsoever than the said purposes hereby designated and authorized; provided that any surplus of the said interest and income that may be left and remain after the said objects and purposes hereby designated as aforesaid, first fully and liberally fulfilled and accomplished according to the true meaning hereof, shall be for the use and at the disposal of him, the petitioner. And it is further ordered that the master under whose direction the said sales should be made, and the debts paid, and surplus proceeds placed out as aforesaid, report to this court the proceedings that may be had in the premises, and the securities that may be taken therein pursuant to this order, with all convenient speed, and that all and every person or persons who are, or is, or may become interested therein, have liberty to apply to this court, at any time or times hereafter, for any further or other orders or directions in or touching the premises.

G.—Act of March 29, 1816.

An act further supplemental to an act entitled "An act for the relief of Thomas B. Clarke."

Be it enacted by the people of the State of New York, represented in senate and assembly, That the said Thomas B. Clarke be, and he is hereby, authorized, under the order heretofore granted by the chancellor, or under any subsequent order, either to mortgage or to sell the premises which the chancellor has permitted, or hereafter may permit, him to sell as trustee under the will of Mary Clarke,
43 and to apply the money so raised by mortgage or sale to the purposes required or to be required by the chancellor, under the acts heretofore passed for the relief of the said Thomas B. Clarke.

H.—Order entered in the minutes, May 30*th*, 1816.

At a court of chancery held for the State of New York, at the city of Albany, on the 13th day of May, in the year of our Lord one thousand eight hundred and sixteen. Present the honorable James Kent, esquire, chancellor.

In the matter of the petition of Thomas B. Clarke.

An order of this court having been heretofore, at a court of chancery held for the State of New York, at the City Hall of the city of New York, on the third day of July, in the year of our Lord one thousand eight hundred and fifteen, made and entered in this cause, in this matter, on the petition of the said Thomas B. Clarke, and the report of Theodorus V. W. Varick, one of the masters of this court, to whom it was referred, to examine into the allegations and matters in the said petition set forth and contained, and to report thereon, been heretofore, at a court of chancery held for the State of New York, at the City Hall, in the city of New York, on the third day of July, in the year of our Lord one thousand eight hundred and fifteen, made and entered by this court in this matter, whereby it was, amongst other things therein contained, in substance ordered that the assent of the chancellor be, and thereby was, given to the sale by the petitioner of the house and lot in the fifth ward of the city of New York, and of the certain moiety or half part of the premises at Greenwich, in the ninth ward of the city of New York, to be divided by the line and in the manner for that purpose mentioned in the said petition; and the said petitioner was authorized and directed to sell and dispose of the same under and according to the act of the legislature in that behalf in the said petition mentioned and in part recited, the said sales to be made under the direction of one of the masters of this court, and the petitioner to proceed in making the sales and conveyances of the said premises so to be sold in the manner for that purpose in and by the said acts prescribed and directed; and that the purchase money for the said premises so to be sold be paid by the purchasers to the said master, to be disposed of by him as thereinafter directed; and by which said order it was further ordered and directed, and his honor the chancellor did authorize, order, and direct, that so much of the nett proceeds to arise from such sales as might be necessary for the purpose should be applied, under the direction of one of the masters of this court, in and for the payment and discharge of the debts then owing by the petitioner, and to be contracted for the necessary purposes of his family, to be proved before said master, and the costs, charges, and expenses of the petitioner on his petition in the said matter, and the pro-
44 ceedings had, and to be thereafter had, under or in consequence thereof, with a proviso or condition in the said order contained for the payment, out of the said funds, of a certain debt in the said order mentioned in the first place, and before and in preference to any other application thereof, and which said order contains further directions for the investment, laying out, and disposal of the residue of the said purchase moneys and the interest thereof for the master under whose direction the said sales should be made, debts paid, and surplus proceeds placed out, to report his proceedings in the premises, and that all and every person or persons who were or was or might become interested therein should have liberty to apply to this court, at any time or times thereafter, for any further or other orders or direction in or touching the premise; and the said Thomas

B. Clarke having lately, that is to say, on or about the thirtieth day of May last past, presented his petition to his honor the chancellor, setting forth, among other things, that the said eastern moiety or half part of the said premises at Greenwich were subdivided into suitable lots for the advantageous sale thereof, which lots, being two hundred and forty full city lots, besides a number of gore lots, were offered for sale under the direction of Theodorus V. W. Varick, one of the masters of this court in the said petition mentioned, at the Tontine coffee-house, in the city of New York, where a few of the said lots were sold, but that the lots which were so sold were struck off at such low prices that he, the petitioner, deemed it expedient to stop the sale thereof, and that the residue of the said lots, though tried at several different times, could not be sold unless at a sacrifice of nearly one-half their true and fair value, and that being unwilling to submit to so ruinous a sacrifice by the sale of the said lots, and having assurances of a loan to answer his exigencies on the security of a mortgage on ten lots, in case an effectual mortgage of the fee-simple thereof could be given to the lenders, but doubts being suggested of the power of your honor, under the said acts in the said petition before mentioned, to authorize the mortgage of the said premises for the purposes intended, the petitioner, to remove all doubts on the sujbect, made application to the legislature at their last session for an act to authorize either the mortgage or sale of the said premises, and that an act was, on or about the twenty-ninth day of March, one thousand eight hundred and sixteen, passed by the legislature, entitled as in the said petition is mentioned, whereby it is in substance enacted that the petitioner be, and he is hereby, authorized, under the aforesaid order of this court, or under any subsequent order, either to mortgage or sell the premises which the chancellor has permitted or may permit him to sell as trustee under the will of Mary Clarke, in the said petition mentioned, and to apply the money raised by mortgage or sale to the purposes required or to be required by the chancellor, under the acts passed for the relief of the said Thomas B. Clarke; and further setting forth that the debts of him, the petitioner, are daily increasing, both by the accumulation of interest, and new loans and purchases for the current expenses of himself and family, and that the president and directors of the Manhattan Company offered to advance him a sufficient sum to answer his purposes, and to take a mortgage on the lots at Greenwich remaining unsold as their security for their advances and interest and the debt already owing to them by the petitioner, as mentioned in his petition, and, among other things, praying the chancellor to authorize, assent to, and direct the petitioner to execute and give to the said president and directors of the Manhattan Company, or such other body corporate, person or persons as should be willing and agree to make the necessary advances to him, the petitioner, in the premises, a mortgage in fee of and upon the lots remaining unsold of the aforesaid eastern moiety or half part of the premises aforesaid, at Greenwich aforesaid, or any part thereof, for securing to the lenders the sum or sums of money which may be advanced by them to the

petitioner in the premises, together with sums as might be already owing to them, with lawful interest, and to authorize and direct the moneys to be raised by such mortgage or mortgages, or so much thereof as might be necessary, to be appropriated and applied in and for the payment of the petitioner's debts contracted in the premises, as mentioned in the petition, with such further advances as the exigencies of himself and family may be found to require, together with costs, which petition is filed; and on motion of Mr. Samuel Jones, jr., of counsel for the petitioner, it is ordered that the said petitioner, under the act entitled "An act further supplemental to the act entitled An act for the relief of Thomas B. Clarke, passed March the twenty-ninth, one thousand eight hundred and sixteen," be, and he is hereby, authorized, so far as the assent or act of this court is requisite, to mortgage instead of selling the lands and premises he was authorized to sell in and by the aforesaid order of this court, of the date of the third day of July last, or any part or parts thereof, and for that purpose to execute and give to the president and directors of the Manhattan Company, or other mortgagee or mortgagees, a mortgage or mortgages in fee of and upon the said lands and premises, or any part thereof remaining unsold, for securing the sum or sums of money to be advanced or lent to the petitioner, or for his use, by the president and directors of the Manhattan Company aforesaid, or other mortgagee or mortgagees, and such debt or debts as may be already owing by him to such lender or lenders, with lawful interest therefor. And it is further ordered that the moneys to be procured and the debts to be extinguished by such mortgage or mortgages be appropriated and adjusted in the same manner and under the same checks, and not otherwise, than is provided for in and by the said before-mentioned order of this court, and that the said before-mentioned order of this court shall apply to and govern the application of moneys to be raised by mortgage equally as if the same had been raised by a sale of all or any of the said lands and premises authorized in and by the said order to be sold; and further, that any party interested or to become interested therein, have liberty to apply to this court, at any time or times hereafter, for any further or other orders and directions in or touching the premises.

46

I.—Order of reference, March 8th, 1817.

At a court of chancery, held for the State of New York, at the City Hall, in the city of New York, on the eighth day of March, in the year of our Lord one thousand eight hundred and seventeen.

Present, the Honorable James Kent, esquire, chancellor.

In the matter of the petition of Thomas B. Clarke.

On reading and filing the petition of Thomas B. Clarke, setting forth that nearly the whole of the eastern moiety of the Greenwich estate mentioned and referred to in the orders heretofore made respecting the same, bearing date the third day of July, eighteen hundred

and fifteen, and the thirtieth day of May, eighteen hundred and sixteen, and which the said petitioner was authorized to sell or to mortgage, was subject to a lease to the Manhattan Company, in the city of New York, to secure the payment to them of the sum of four thousand four hundred dollars, nine years of which lease were still unexpired; that the said Manhattan Company declined to advance any more money to the petitioner, and refused to surrender the said lease on any terms short of the actual payment of the whole demand, whereby the petitioner was placed in a very embarrassed situation, not only without the means of support, but wholly unable to satisfy his other creditors, some of whom are persons who have voluntarily come forward to the assistance of the petitioner on the faith of his power to sell or pledge the said eastern moiety of the said estate; that he has not been able to make scarcely any sales or to raise any money upon mortgage without a sacrifice of property, which he did not consider himself warranted to make; that the presure of his debts and the necessities of his family require some measures for their relief, and representing the propriety and expediency of dividing the said estate by an eastern and western instead of a northern and southern line, and of granting to the said petitioner the power to sell or mortgage the southern instead of the eastern moiety of the said estate, in addition to the lot in Broadway, described in the said order of the third of July, eighteen hundred and fifteen, by which arrangement the northern moiety of the said estate would remain entire for the future benefit of his children, the same being subject to no other incumbrance affecting their interest, excepting a lease of between four and five acres thereof to Robert Lenox, esquire, executed by the testatrix in her lifetime, and which will expire in about fifteen months; that the said petitioner has sold but ten of two hundred and thirty lots or thereabouts, which compose the said eastern division, and that those ten lots fall within the said southern moiety of the said estate; whereupon the said petitioner prays permission either to sell or mortgage the said
47 southern division of the said estate, or such parts of it as may be necessary, together with the said lot in Broadway, subject to such restrictions as this court may think fit to impose, in order that the petitioner may be able to pay and satisfy his said debts, and in case the petitioner should not be able to meet with a ready sale for the said property, that he might be allowed to convey certain lots of the said southern moiety to his creditors in satisfaction of his said debts, at a valuation to be approved of by one of the masters of this court: It is thereupon, on motion of Mr. Samuel Jones, junior, solicitor for the petitioner, ordered that it be referred to one of the masters of this court to inquire whether any of the property sold or mortgaged by the said Thomas B. Clarke is situated within the said northern moiety of the said estate, the same being divided as nearly as may be by a line running from east to west through the said estate, and that he report thereon with all convenient speed.

J.—Order of chancellor, March 15th, 1817.

At a court of chancery, held for the State of New York, at the City Hall, of the city of New York, on the fifteenth day of March, in the year of our Lord one thousand eight hundred and seventeen. Present, the honorable James Kent, esquire, chancellor.

In the matter of the petition of Thomas B. Clarke.

48 On reading and filing the report of James A. Hamilton, esquire, one of the masters of this court, bearing date the eleventh day of March, one thousand eight hundred and seventeen, by which it appears that no part of the northern moiety of the estate at Greenwich, mentioned in the petition of the above-named petitioner, the same being divided into two equal parts by a line running from east to west, through a street called Twenty-sixth street, has been either sold or mortgaged by the said Thomas B. Clarke, and it appearing to this court reasonable and proper that the prayer of said petitioner should be granted, it is thereupon ordered, on motion of Mr. S. Jones, solicitor for the petitioner, that the said petitioner be, and he is hereby, authorized to sell and dispose of the southern moiety of the said estate, the same being divided by a line running east and west through the centre of Twenty-sixth street aforesaid, together with a lot in Broadway, instead of the eastern moiety of the said estate, as permitted and directed by the orders heretofore made in the premises. And it is further ordered that the said Thomas B. Clarke be, and he hereby is, authorized to mortgage all or any tract or parts of the said southern moiety of the said estate, if in his judgment it will be more beneficial to mortgage them than to sell the same. And the said Thomas B. Clarke is further authorized to convey any part or parts of the said southern moiety of the said estate in payment and satisfaction of any debt or debts due and owing from the said Thomas B. Clarke, upon a valuation to be agreed on between him and his respective creditors; provided, nevertheless, that every sale and mortgage and conveyance in satisfaction that may be made by the said Thomas B. Clarke in virtue hereof shall be approved by one of the masters of this court, and that a certificate of such approval be indorsed upon every deed or mortgage that may be made in the premises. And it is further ordered that the said Thomas B. Clarke shall be, and is hereby, authorized to receive and take the moneys arising from the premises, and apply the same to the payment of his debts, and invest the surplus in such manner as he may deem proper, to yield an income for the maintenance and support of his family.

K.—Deed—Clarke to McIntyre.

This indenture, made this twentieth day of October, in the year of our Lord one thousand eight hundred and eighteen, between Thomas B. Clarke, of the city of New York, gentleman, of the first part, and Peter McIntyre, of the same place, of the second part. Whereas the said Thomas B. Clarke, by virtue of sundry conveyances, acts of the legislature, and orders of the court of chancery of the

State of New York, hath been empowered to sell, or mortgage, or convey in satisfaction of any debt due from him to any person or persons, the southern moiety of the estate at Greenwich, devised by Mary Clarke, deceased, for the benefit of the said Thomas B. Clarke and his children, or any part therof; and whereas the said Thomas B. Clarke is indebted to the
49 said party of the second part in a large sum of money: Now, therefore, this indenture witnesseth that the said Thomas B. Clarke, in consideration of the premises, and of thirty-seven hundred and fifty dollars, lawful money of the United States, to him in hand paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, enfeoff, convey, and confirm, unto the said party of the second part, his heirs and assigns forever, all those lots of ground situate, lying, and being in the ninth ward of the city of New York, known and distinguished on a certain map of the property of the said Thomas B. Clarke, made by Amos Corning and Uzal W. Freeman, city surveyors, by the numbers one hundred seventeen (117) and one hundred and eighteen (118;) also one hundred and thirty-one (131,) one hundred and thirty-two (132,) and one hundred and thirty-three (133;) also one hundred and thirty-four (134,) one hundred and thirty-five (135,) one hundred and thirty-six (136,) one hundred and thirty-seven (137,) one hundrnd and thirty-eight (138,) one hundred and thirty-nine (139;) also one hundred and five (105,) one hundred and six (106,) one hundred and seven (197,) one hundred and eight (108,) one hundred and nine (109;) also sixty-four (64.) sixty-five (65,) sixty-six (66,) and sixty-seven (67,) bounded as follows: lots Nos. 117 and 118 are bounded westerly by the Hudson river, northerly by lot No. 119, easterly by the Tenth avenue, and southerly by Twenty-fifth street; lots Nos. 131, 132, 123, are bounded westerly on the Tenth avenue, northerly by lot No. 130, easterly by lot No. 134, and southerly by Twenty-fifth street; lots Nos. 134, 135, 136, 137, 138, and 139 are bounded westerly by lots Nos. 130, 131, 132, and 133, northerly by lots Nos. 184, 185, 186, 187, 188, and 189, easterly by lot No. 140, and southerly by Twenty-fifth street; lots Nos. 105, 106, 107, 108, and 109, are bounded northerly by Twenty-fifth street, easterly by lot No. 110, southerly by lots Nos. 66, 67, 68, 69, and 70, and westerly by lot No. 104; lots Nos. 64, 65, 66, and 67 are bounded southerly by Twenty-fourth street, westerly by lot No. 68, northerly by lot Nos. 108, 109, 110, and 111, and easterly by lot No. 63; with all and singular the privileges, advantages, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever of the said party of the first part, either in law or equity, of, in, and to the above bargained premises, with the hereditaments and appurtenances. To have and to hold the said premises unto the said party of the second part, his heirs and assigns forever. And the said

Thomas B. Clarke, for himself, his heirs, executors, and administrators, doth covenant, grant, promise, and agree to and with the said party of the second part, his heirs and assigns, that the above bar-
50 gained premises, in the quiet and peaceful enjoyment of the said party of the second part, his heirs and assigns, against all and every person lawfully claiming or to claim, the whole or any part of the above mentioned and described premises, shall and will warrant and defend forever.

In witness whereof, the said party of the first part hath hereunto set his hand and seal on the day and in the year first above written.

T. B. CLARKE. [L. S.]

Sealed and delivered in the presence of—
SAMUEL CURTISS.

STATE OF NEW YORK, *ss:*

On this twentieth day of October, in the year 1818, before me personally appeared Thomas B. Clarke, known to me to be the same person described in and who executed this indenture, and he duly acknowledged that he executed the same. There being no alteration therein, I allow the same to be recorded.

JOHN C. HAMILTON, *Commissioner.*

Recorded in the office of the register for the city and county of New York, at the request of Peter McIntyre, the 16th day of December, at three o'clock p. m., in liber No. 134 of conveyances, page 60.

L.—Master's approval.

Having examined the within deed, I approve of it as to manner and form.

New York, December 14, 1818.

JAMES A. HAMILTON,
Master in Chancery.

M.—Deed from Hamilton to McIntyre.

Know all men by these presents that whereas John Wallis and Henry Simmons, together with one Robert Stewart, having obtained three several judgments against the within grantor, Thomas B. Clarke, whereon three several writs of fieri facias were issued; and whereas all the estate, right, title, and interest of the said Thomas B. Clarke to the premises within mentioned and described, together with diverse other premises, was sold by the sheriff of the city and county of New York under and by virtue of the aforesaid writs; and whereas all the estate, right, title, and interest of the said Thomas B. Clarke, so sold as aforesaid, was his life estate in and to the said premises; and whereas the said John Wallis and Henry Simmons became the purchasers thereof; and whereas the said John Wallis and Henry Simmons, by indenture bearing date the nineteenth day of April, in the

year of our Lord one thousand eight hundred and seventeen, and which was recorded in the office of register in and for the city and
51 county of New York, in liber No. 20 of conveyances, page 475, on the eighth day of May, one thousand eight hundred seventeen, as by reference thereto will more fully and at large appear, conveyed to James A. Hamilton, of the city of New York, esquire, in trust for the benefit of the said Thomas B. Clarke, all their right, title, and interest in and to the premises in the within indenture mentioned and described, together with divers other premises in the said indenture above referred to, as by reference to the record thereof will at large appear: Now, therefore, know ye, that I, James A. Hamilton, for the purpose of carrying into effect the said trust, and at the request of the said Thomas B. Clarke, which said request is testified by his having executed the within indenture, and in consideration of one dollar to me in hand paid by the within-named Peter McIntyre, party of the second part to the within indenture, have, and by these presents do, remise, release, and quitclaim to the said Peter McIntyre, and to his heirs and assigns, all my right, title, and interest in and to the said twenty lots of ground, particularly mentioned and described in the within indenture, together with the appurtenances, unto the said Peter McIntyre, his heirs and assigns, and to his and their only proper use and benefit and behoof.

In witness whereof, I have hereunto set my hand and seal this fourteenth day of December, in the year of our Lord one thousand eight hundred and eighteen.

JAMES A. HAMILTON. [L. S.]

Sealed and delivered in the presence of—
JOHN C. HAMILTON.

STATE OF NEW YORK, *ss:*

On this fourteenth day of December, in the year 1818, before me, personally appeared James A. Hamilton, known to me to be the same person described in and who executed this instrument in writing, and he duly acknowledged that he had executed the same. There being no alteration therein, I allow the same to be recorded.

JOHN C. HAMILTON, *Commis'r.*

Recorded in the office of the register of the city and county of New York, at the request of Peter McIntyre, the 16th day of December, 1818, at three o'clock p. m., in liber No. 134 of conveyances, page 62.

N.—Mortgage deed from Peter McIntyre to Elijah Humphreys.

This indenture, made the thirtieth day of January, in the year of our Lord one thousand eight hundred and thirty, between Peter McIntyre, of the city of New York, boarding-house keeper, of the first part, and Elijah Humphreys, of the same city, merchant, of the second part, witnesseth, that the said party of the first part, for
52 and in consideration of the sum of two hundred dollars, lawful money of the United States of America, to him in hand paid

by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath remised, released, and quitclaimed, and by these presents doth remise, release, and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all those lots of ground situate, lying, and being in the ninth ward of the said city of New York, known and distinguished on a certain map of the property of Thomas B. Clarke, of the said city, gentleman, made by Amos Corning and Uzal W. Freeman, city surveyors, by the numbers one hundred and seventeen and one hundred and eighteen, (118,) also one hundred and thirty-one, (131,) one hundred and thirty-two, (132,) one hundred and thirty-three, (133;) also one hundred and thirty-four, (134,) one hundred and thirty-five, (135,) one hundred and thirty-six, (136,) one hundred and thirty-seven, (137,) one hundred and thirty-eight, (138,) one hundred and thirty-nine, (139;) also one hundred and five, (105,) one hundred and six, (106,) one hundred and seven, (107,) one hundred and eight, (108,) one hundred and nine, (109;) also sixty-four, (64,) sixty-five, (65,) sixty-six, (66,) and sixty-seven, (67;) bounded as follows: lots Nos. 117 and 118 are bounded westerly by the Hudson river, northerly by lot No. 119, easterly by Tenth avenue, and southerly by 25th street; lots Nos. 131, 132, and 133 are bounded westerly on the Tenth avenue, northerly by lot No. 130, easterly by lot No. 134, and southerly by 25th street. Lots Nos. 134, 135, 136, 137, 138, 139, are bounded westerly by lots Nos. 130, 131, 132, and 133, northerly by lots 184, 185, 186, 187, 188, 189, easterly by lot No. 140, and southerly by 25th street; lots Nos. 105, 106, 107, 108, and 109 are bounded northerly by 25th street, easterly by lot No. 110, southerly by lots Nos. 66, 67, 68, 69, and 70, and westerly by lot No. 104; lots 64, 65, 66, and 67 are bounded southerly by 24th street, westerly by lot No. 68, northerly by lots Nos. 108, 109, 110, and 111, and easterly by lot No. 63; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the above-described premises, and every part and parcel thereof, with the appurtenances. To have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

P. McINTYRE. [L. S.]

Sealed and delivered in the presence of—
H. H. BURLOCK.

53 CITY AND COUNTY OF NEW YORK, *ss:*

I do hereby certify that on the third day of February, in the year of our Lord one thousand eight hundred and thirty, before me personally appeared Peter McIntyre, of said city, known to me to be the same person described in and who executed the within indenture in my presence, and he acknowledged that he executed the same as his act and deed, for the uses and purposes therein mentioned. Wherefore, I do allow the same to be recorded.

THOMAS C. PINCKNEY,
Commissioner, &c.

Recorded the preceding at the request of C. S. Woodhull, the 5th day of February, 1830, at 11 min. past 10 a. m.

MORRIS FRANKLIN, *Dep. Reg.*

I do hereby certify that I have compared the preceding with the original record of a deed recorded in the office of register of the city and county of New York, liber 258 of conveyances, page 227, and the same is a correct transcript therefrom, and of the whole of such original record.

Given under my hand this 5th day of March, 1835.

For WM. H. BUNN, *Register,*
A. H. ROBERTSON, *Dep'y Reg.*

54 *P.— Deed from Ruggles to Suydam.*

This indenture, made the nineteenth day of February, in the year one thousand eight hundred and forty-five, between Philo T. Ruggles, one of the masters in chancery in and for the State of New York, dwelling in the city of New York, party of the first part, and James H. Suydam, of the same place, stonecutter, of the second part. Whereas at a court of chancery held at the city of New York, before the vice-chancellor of the first circuit of the State of New York, on the twenty-fourth day of December, one thousand eight hundred and forty, it was, among other things, ordered, adjudged, and decreed by the said court, in a certain cause then pending in the said court between Maria Humphreys, administratrix, and Richard M. Clark, administrator, &c., of Elijah Humphreys, deceased, complainants, and Peter McIntyre, defendant, that all and singular the mortgaged premises mentioned in the bill of complaint in said cause and in said decree described, or so much thereof as might be sufficient to raise the amount due to the complainant for principal and interest and costs in said cause, and which might be sold separately without material injury to the parties interested, be sold at public auction, according to the course and practice of this court, by or under the direction of one of the masters thereof residing in the city of New York; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the master give public notice of the time and place of such sale, according to the course and practice of said court, and that any of the parties in said cause might

become a purchaser or purchasers on such sale; that the said master execute to the purchaser or purchasers of the said mortgaged premises, or such part or parts thereof as should be so sold, a good and sufficient deed or deeds of conveyance for the same; and whereas a certificate of the enrolment of said decree, signed by the clerk of said court, has been presented to the said party of the first part; and whereas the said master in chancery, in pursuance of the order and decree of the said court, did, on the twenty-ninth day of April, and first day of May, 1844, sell at public auction, at the Merchants' Exchange, in the city of New York, part of the premises in the said order mentioned, due notice of the time and place of such sale being first given, agreeably to the said order, at which sale the premises hereinafter described were struck off to said party of the second part, for the sum of five thousand five hundred dollars, that being the highest sum bidden for the same: Now this indenture witnesseth, that the said master in chancery, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and decree of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises and of the said sum of money so bidden as aforesaid, being first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained, sold, and by these presents doth grant and convey unto the said party of the second part, his heirs and assigns, all those two certain lots, pieces, or parcels of land, being part of the said mortgaged premises, situate, lying, and being in the sixteenth ward of the city of New York, on the northerly side of Twenty-fourth street in the city of New York, and known and distinguished on a certain map of the property of Thomas B. Clarke, of the said city, gentleman, made by Amos Corning, Uzal W. Freeman, city surveyors, by the numbers sixty-four (64) and sixty-five (65,) bounded and containing as follows: Southerly, in front, by Twenty-fourth street, westerly by lot number sixty-six (66) on said map, northerly by lots Nos. 110 and 111 in said map, and easterly by lot number 63 on said map.

And also all those two certain other lots, pieces, or parcels of land, being part of the said mortgaged premises, situate, lying, and being in the said sixteenth ward in the city of New York, on the westerly side of the Tenth avenue, and known and distinguished on the map aforesaid by the numbers one hundred and seventeen (117) and one hundred and eighteen (118;) the said lot number 118 being bounded westerly by the Hudson river, northerly by lot No. 119 on said map, easterly by the Tenth avenue, and southerly by lot No. 117 on said map; the said lot No. 117 being bounded westerly by the Hudson river, on the south by Twenty-fifth street, on the east by the Tenth avenue, on the north by lot number 118 on said map.

To have and to hold all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit, and behoof forever.

In witness whereof, the said Philo T. Ruggles, master in chancery as aforesaid, hath hereunto set his hand and seal the day and year first above written.

PHILO T. RUGGLES, [L. S.]
Master in Chancery.

Sealed and delivered in the presence of—(three lines on second page erased before execution)—
HY. P. WANMAKER.

56 STATE OF NEW YORK, *ss:*

On the twentieth day of February, one thousand eight hundred and forty-five, before me came Philo T. Ruggles, known to me to be the individual described, and who executed the above conveyance, and acknowledged that he executed the same.

HY. P. WANMAKER, *Com. of Deeds.*

Recorded in the office of the register of the city and county of New York, in liber No. 454 of conveyances, page 479, February 28th, 1845, at 11 a. m.

J. SHERMAN BROWNELL, *Register.*

These printed documents hereto annexed to the foregoing bill of exceptions in the case of Williamson and *als. vs.* Suydam were read on the trial thereof, and are referred to in the bill of exceptions.

W. D. SHIPMAN, *Judge.*

Bond for costs.

57 Circuit court of the United States of America for the southern district of New York, in the second circuit.

WILLIAMINA H. WILLIAMSON, DAVID R. WILliamson, Mary A. Williamson, Isabella Williamson, Catharine B. Williamson, Charlotte A. Williamson, Rupert J. Cochrane, Isabella M. Cochrane, and Bayard Clarke, plaintiffs,
vs.
JAMES H. SUYDAM, defendant.

Know all men by these presents that we, James H. Woods and Ichabod T. Williams, of the city of New York, are held and firmly bound unto the above-named James H. Suydam in the sum of five hundred dollars, to be paid to the said James H. Suydam, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the eleventh day of April, in the year of our Lord one thousand eight hundred and sixty-five.

Whereas the above-named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute the said writ of error to effect, and answer all damages and costs if they fail to make the said writ of error good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

JAMES H. WOODS. [L. S.]
ICHABOD T. WILLIAMS. [L. S.]

Sealed and delivered and taken and acknowledged this 11 day of April, 1865, before me.

ALLAN MELVILLE, *Notary Public.*

JAMES PRICE, *as to Ichabod T. Williams.*

58 UNITED STATES OF AMERICA, *Southern district of New York, ss:*

James H. Woods, of the city of New York, being duly sworn, doth depose and say that he resides at No. 40 Grove st., in the city of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JAMES H. WOODS.

Sworn to this 11th day of Ap'l, A. D. 1865, before me,
ALLAN MELVILLE, *Notary Public.*

STATE OF NEW YORK, *City and county of New York, ss:*

On this eleventh day of April, A. D. 1865, before me came personally Ichabod T. Williams, known to me to be the same person described in and who executed the aforegoing instrument, and acknowledged that he executed the same for the purposes therein mentioned.

JAMES PRICE, *Notary Public, N. Y.*

STATE OF NEW YORK, *City and county of New York:*

On this 11th day of April, A. D. 1865, before me personally appeared James H. Woods, to me known to be the same person described in and who executed the within instrument, and acknowledged that he executed the same for the purposes therein mentioned.

ALLAN MELVILLE, *Notary Public.*

The within bond is hereby approved.

WM. D. SHIPMAN, *J.*

Filed this 14 day of June, 1865.

59 By the honorable William D. Shipman, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit, to James H. Suydam:

Whereas Williamina H. Williamson, David R. Williamson, Mary A. Williamson, Isabella Williamson, Catharine B. Williamson, Charlotte A. Williamson, Rupert J. Cochran, Isabella M. Cochrane, and Bayard Clarke, lately issued out of the Supreme Court of the United States a writ of error, directed to the judge of the circuit court of the

United States for the southern district of New York, in the second circuit, stating that in the record and proceedings, as also in the rendition of the judgment, of a plea in the said court before the judge thereof, between the said Williamina H. Williamson, David R. Williamson, Mary A. Williamson, Isabella Williamson, Catharine B. Williamson, Charlotte A. Williamson, Rupert J. Cochrane, Isabella M. Cochrane, and Bayard Clarke, plaintiffs, and the said James H. Suydam, defendant, a manifest error hath happened, to the great damage of the said plaintiffs; and whereas for the correction of that error in due manner the said writ has been issued, returnable at the next stated Supreme Court of the United States, at the city of Washington, on the first Monday of Dec'r next, you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of Dec'r next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 12th day of June, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

WM. D. SHIPMAN, *Judge.*

60 Indorsed: Due service of a copy of the within citation this day admitted.

New York, June 12, 1865.

N. DANE ELLENGWOOD,
p. SUYDAM.

Filed June 14th, 1865.

Supreme Court of the U. S.

DECEMBER TERM, 1867.

WILLIAMINA H. WILLIAMSON & OTHERS,
Plaintiffs in Error.

against

JAMES H. SUYDAM,
Defendant in Error.

POINTS AND BRIEF

FOR THE PLAINTIFFS IN ERROR.

DUDLEY FIELD,
Plaintiffs' Attorney.

DAVID DUDLEY FIELD,
Of Counsel.

NEW YORK:
WILLIAM J. READ, LAW AND JOB PRINTER,
98 Nassau Street (between Fulton and Ann).

1868.

Supreme Court of the U. S.

WILLIAMINA H. WILLIAMSON, and others,	December Term, 1867.
agst.	POINTS AND BRIEF FOR PLAINTIFFS.
JAMES H. SUYDAM.	

STATEMENT.

This case comes here upon a Writ of Error to the Circuit Court of the United States for the Southern District of New York. The action was ejectment, to recover two lots of land on Twenty-fourth Street, in the City of New York. The case has been tried three times, and a verdict for the plaintiff's twice rendered. On the last trial a verdict for the defendant was ordered by the Court.

The action was brought by Charles A. Williamson and Catherine H., his wife; Rupert J. Cochran and Isabella M., his wife; and Bayard Clarke. Mr. and Mrs. Williamson having since died, their heirs have been made parties in their place. (*Record*, page 5.)

The declaration was in the ordinary form, (page 2). The plea was the general issue (page 5).

On the last trial the following facts appeared in evidence:

The property originally belonged to Mary Clarke, who died in 1802, having devised it to three trustees in trust

to receive the rents, issues and profits thereof, and to pay the same to Thomas B. Clarke during his natural life, and upon his death in further trust to convey the property to his lawful issue, living at his death in fee; and if he should not leave issue, then to convey to Clement C. Moore, in fee (page 11). Thomas B. Clarke died in 1826, and Mrs. Williamson, Mrs. Cochran and Bayard Clarke, original plaintiff's, were his children (page 17). Two of the trustees died before Mr. Clarke, and the third in 1838. The plaintiff's have therefore a title and right of possession, unless the defendant can establish a valid alienation of the property. He claims under a conveyance made by Thomas B. Clarke to one McIntyre, alleging that the former was authorized by certain private acts of the Legislature of the State of New York, and by certain orders of the Chancellor of New York, to make such conveyance. The history of these acts and orders, and of the conveyance, is as follows:

In 1814, the Legislature of New York, on the application of Mr. Clarke, passed an act, entitled "An Act for the relief of Thomas B. Clarke," in which it was provided, among other things, that the Court of Chancery, on his application, might "appoint one or more trustees to execute and perform the several trusts and duties" specified in the will, in place of the testamentary trustees, "*who are hereby discharged from the trusts in the said Will mentioned;*" and, further, that the new trustees should, "as soon as conveniently may be partition and *divide*" *the land* "*into two equal parts*, one moiety whereof shall be held by them to the uses and upon the trusts declared in and by the said Will, and the remaining moiety shall be subdivided by the said trustees, or the major part of them, into so many lots as they or the major part of them may think most likely to effect an advantageous sale thereof; and after having completed such subdivision, the said trustees, or the major part of them, are hereby authorized and required, within a convenient time thereafter, not to exceed six months, except at the request of the said Thomas B. Clarke, to sell and dispose of the said last subdivided moiety," the proceeds to be

invested, the interest, excepting a certain portion, to be paid to Mr. Clarke, and the principal reserved for the trusts of the Will (page 14).

In 1815, on the application of Mr. Clarke, a supplemental act was passed authorizing him "to execute and perform every act, matter and thing in relation to the real estate, in like manner and with like effect that trustees duly appointed under the said act might have done, and that the said Thomas B. Clarke apply the whole of the interest and income of the said property to the maintenance and support of his family and the education of his children;" and further providing that "no sale of any part of the said estate shall be made by the said Thomas B. Clarke until he shall have procured the assent of the Chancellor to such sale, who shall, at the time of giving such assent, also direct the mode in which the proceeds of such sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke as trustee; and, further, that it shall be the duty of the said Thomas B. Clarke annually to render an account to the Chancellor, or to such person as he may appoint of the principal of the proceeds of such sale only, the interest to be applied by the said Thomas B. Clarke in such manner as he may think proper for his use and benefit, and for the maintenance and education of his children" (page 18).

On the 3d of July, 1815, an order was made by the Chancellor, on the petition of Mr. Clarke, authorizing him to sell and dispose of the *eastern moiety* of the estate, "to be divided by the line in the manner for that purpose mentioned in the said petition," the sales to be made under the direction of a Master, and the proceeds to be paid to the Master, and applied and invested according to the directions of the order (page 51).

In 1816 a third act was passed, authorizing the said Thomas B. Clarke, "under the order heretofore granted by the Chancellor, or under any subsequent order, either to mortgage or to sell the premises which the Chancellor has permitted, or hereafter may permit him to sell, as trustee under the will of Mary Clarke, and to apply the

money so raised, by mortgage or sale, to the purposes required or to be required by the Chancellor, under the acts" theretofore passed (page 24).

On the 15th of March, 1817, the Chancellor, upon the petition of Mr. Clarke, made an order to the following effect: That Mr. Clarke be authorized to sell the *southern moiety* of the said estate, the same being divided by a line running east and west through the centre of Twenty-sixth Street, * * * * * *instead of the eastern moiety* of the said estate, as permitted and directed by the orders theretofore made in the premises; and further authorizing the said Thomas B. Clarke to mortgage all or any part or parts of the said southern moiety of the said estate, if in his judgment it would be more beneficial to mortgage than to sell the same; and further, authorizing the said Thomas B. Clarke to convey any part or parts of the said southern moiety of the said estate, in payment and satisfaction of any debt or debts, due and owing from the said Thomas B. Clarke, upon a valuation to be agreed on between him and his respective creditors: provided, nevertheless, that *every sale* and *mortgage* and *conveyance in satisfaction*, that might be made by the said Thomas B. Clarke in virtue thereof, *should be approved by one of the Masters* of the Court, and that a *certificate* of such approval be *indorsed* upon *every deed or mortgage* that might be made in the premises; and further authorizing the said Thomas B. Clarke to receive and take the moneys arising from the premises, and apply the same to the payment of his debts, and invest the surplus in such manner as he might deem proper, to yield an income for the maintenance and support of his family (page 29).

On the 20th of October, 1818, Clarke executed a deed of twenty lots, including the two in suit, to Peter McIntyre. The consideration recited in the deed is the indebtedness of the grantor to the grantee "in a large sum of money," and $3,750 paid (page 30). No proof whatever was made on this trial of the real consideration; though it was attempted on the former trials.

The original deed was recorded; the record of it has no approval of a Master thereon. The defendant was permitted to prove, under the plaintiff's exception, (page 8,) that there was an indorsement on the original deed, in the following form:

"Having examined the within deed, I approve of it as to manner and form.

"NEW YORK, *December* 14, 1818.

"JAMES A. HAMILTON,

"*Master in Chancery.*"

The defendant was further permitted to read in evidence, subject to the plaintiffs' exception, a deed from McIntyre to Elijah Humphreys (page 33), and a deed from Philo T. Ruggles, Master in Chancery, to the defendant (page 34).

Upon these naked documents, without further proof, the jury was directed to render a verdict for the defendant.

The lots in suit are in the western moiety of the estate, as first divided.

The history of the litigation is curious and instructive. Questions under these private statutes of New York first arose in the Courts of New York, in the case of *Sinclair* agst. *Jackson*, 8 *Cowen*, 579, in which case the Court declined to express an opinion, respecting "the constitutionality of the laws, or the efficacy of the proceedings under them." The next case was *Cochran* agst. *Van Surlay*, 20 *Wend.* 365 (*S. C.*, 15 *Wend.*, 439), where a majority of the Court of Errors (12 to 7) decided, that the statutes were constitutional, and that the proceedings shown in that case had been taken in conformity to the statutes.

Other proceedings under these statutes came afterwards before the Courts of the United States, and in three different suits were decided by this Court: *Williamson* against *Berry*, 8 *How.*, 495; *Williamson* against *The Irish Presbyterian Congregation*, 8 *How.*, 565; and *Williamson* against *Bell*, 8 *How.*, 566. These cases came up from the Circuit Court of Southern New York, on

certificates of division of opinion, and the answers given covered nearly all the questions, which arose *respecting the conformity of the proceedings to the requisitions of the statutes*, but *no decision was given*, as no question arose *respecting the validity of the statutes*. The present case (*Williamson* against *Suydam*) was first decided by the Circuit Court, in conformity to the decisions in the 8th of *Howard*. A writ of error was taken to this Court, where the judgment was affirmed (20 *How.*, 429), because there was no bill of exceptions with the record. Subsequently, a bill of exceptions was allowed, and the case came here again, when the judgment was reversed on the sole ground, that subsequently to the cases in the 8th of *Howard*, the Courts of New York had reiterated the decision in *Cochran* against *Van Surlay*, and thus established a law of property, which the federal courts must enforce, whatever may be their own opinion or decisions (24 *How.*, 433). The New York cases to which this Court thus referred were *Towle* against *Forney*, 14 *N. Y.*, 426 (*S. C.*, 4 *Duer*, 164); and *Clarke* against *Davenport* (1 *Bosw.*, 96).

Since this Court has thus determined, that it will look only to the State Courts for the exposition of statutes and documents affecting the title to land, even though it may have previously adjudged that such exposition was erroneous, and however contrary to reason that exposition may be, the plaintiffs must abstain from debating any of the questions so resolved. Though one of the points first decided in the State Court was, that the order of the Chancellor of New York, authorizing Clarke to sell, to mortgage, and to convey in satisfaction of his debts, with the proviso "that *every sale and mortgage and conveyance in satisfaction*, that may be made by the said Thomas B. Clarke, in virtue hereof, shall be approved by one of the masters," meant only that *a conveyance in satisfaction* was to be thus approved, and though every State Judge since, who has followed this decision has disapproved it, and though this Court has rejected it, yet it has receded from its former judgment, in order to follow it. There seem to be now, if these

private statutes are all valid, no means left to Clarke's children of maintaining their title against his alienation of this eastern moiety, for whatever consideration made, and however improvident and unapproved.

Fortunately, however, there is one question peculiar to the present case, and never before a State Court; and there is another question which belongs to this Court to determine without regard to the State Courts. One is a question of construction of one of the statutes, and the other is a question under the Constitution of the United States. The first section of the first statute (*Record*, p. 13), after reciting the will, the unproductiveness of the estate, and the consent of the trustees to be discharged, enacted that the trustees be thereby "*discharged from the trusts in the said will mentioned.*" If this discharge is not valid, the plaintiffs must recover, and thus arises one of the questions. The second section of the same statute enacted that the new trustee, who finally proved to be none other than Clarke, the life tenant, should partition the estate into two equal parts, *one of which should be held to the uses and upon the trusts of the will.* The new trustee did thereupon divide the estate by a *north and south line*, holding the western portion upon the trusts of the will, and the eastern portion for sale. After acting under this division, he made a new division by an *east and west line* (*Record*, p. 28, 29). The two lots in controversy in the present case, were in the western division, that one which had been reserved from sale (*Record*, p. 8, fol. 21). If the first division was final, these lots could not be afterwards sold, and thus arises the other question.

The question of constitutionality was once brought before this Court, upon writ of error in *Towle* v. *Farney*, but the writ was dismissed for want of jurisdiction, because it did not appear by the record that the point had been raised and decided below. (1 *Black*, 350.)

POINTS.

POINT FIRST.—The life-tenant, having once partitioned the estate, with the Chancellor's assent, by a north and south line, and having acted under this partition, selling lots in the eastern moiety, could not recall that partition, and make a new one by an east and west line, thereby subjecting to the power of sale lots which were not within the eastern moiety. The two lots, in controversy here, were in the western moiety, and therefore were in that portion of the estate which the acts declared should continue to be held under the trusts of the will. The power of the life-tenant was not a shifting, uncertain power. If the private acts took effect at all, the estate thenceforth was held in moieties upon two different trusts or tenures; one inalienable, and subject to the strict trusts of the will, the other divested of this trust, and with a power of alienation. The moment the partition was once made, these separate trusts or tenures were stamped upon the separate moieties. The two lots now in controversy, therefore, became subject to the trusts of the will, and inalienable by the life-tenant.

The language of the first act, on the subject of the partition, was as follows (folio 40): "*The trustees* appointed, or to be appointed, by or under the authority of this act, or the major part of them, *shall*, as soon as conveniently may be, *partition and divide all that certain tract of land*, described in the said last will and testament as follows (describing it): *into two equal parts, one moiety whereof shall be held by them to the uses, and upon the trusts declared in and by the said will*, and the remaining moiety shall be subdivided" into lots and sold, &c.

The subsequent acts made no change in respect to this partition, other than to provide that Thomas B. Clarke should take the place of the trustees mentioned in the first act (folio 64).

The order of the Chancellor, of July 3d, 1815, declares (folio 99), that "the assent of the Chancellor be, and hereby is given to the sale by the petitioner of the said house and lot in the Fifth Ward of the City of New York, and of the *eastern moiety, or half part of the said premises at Greenwich, in the Ninth Ward of the City of New York, to be divided by the line, in the manner for that purpose mentioned in the said petition.*"

The order of May 30th, 1816, provides (folio 122) that the petitioner "be, and he is hereby authorized, so far as the assent or act of this Court is requisite, *to mortgage*, instead of selling, *the lands and premises he was authorized to sell*, in and *by the aforesaid order* of this Court, of the date *of the third day of July last*, or any part or parts thereof."

The order of March 15th, 1817, provides (folio 134), "that the said petitioner be, and he is hereby authorized to sell and dispose of the *southern moiety of the said estate, the same being divided by a line running east and west through the centre of Twenty-sixth Street aforesaid*, together with the said lot in Broadway, *instead of the eastern moiety of the said estate, as permitted and directed by the orders heretofore made in the premises.*"

I.—The power to partition the estate into two equal parts, one of which was to be *held* upon the trusts of the Will, and the other made subject to sale, was *exhausted* by the partition into an eastern and western portion. The attempt to undo what had been done, and to make a new partition into a northern and southern portion, was without authority.

That the authority conferred upon Clarke was a power to be strictly pursued has been expressly adjudged by this Court in the cases reported in the 8th of Howard. One of the questions certified was "whether the authority given by the said acts to the trustee to sell was a special power to be strictly pursued, or whether he was vested with the absolute power of alienation, subject only to re-examination and account in equity" 8 *How.*, 532;

and in answer the Court ruled, "that the authority given by the said acts to the trustee to sell was a special power to be strictly pursued, and that the trustee was not vested with the absolute power of alienation, but only with the power to sell with the assent of the Chancellor, subject in all that the trustee might do, by way of sale or otherwise, touching the premises, to re-examination and account in equity" (8 *How.*, 549).

In the Courts of New York, Clarke is generally considered a trustee; though a trustee with limited attributes. But whether his authority be regarded as technically a *power or a limited trust*, is not very material, since nobody has ever pretended that he had that kind of authority, which would have enabled him to aliene both moieties, that is to say, the whole estate.

II.—It may be proper to remark, here, that the New York decisions have not been uniform; and when against the children, have been met with dissent, and qualified by doubt and hesitation. Judge BRONSON began the series with language of distrust and disapproval of the kind of legislation in question; Chancellor WALWORTH concurred in the judgment below with hesitation; Senator VERPLANCK and six other members of the Court of Errors dissented. After this, Vice-Chancellor SANDFORD, whose reputation as a Judge of singular acuteness and learning is hardly excelled, examined all the questions, in *Williamson* a. *Field*, and inquiring into the validity of one of Clarke's mortgages, held that it was valid in part and *invalid for the rest*, using this language: "It is plain that the order of the Court did not confer upon Clarke *an authority* to mortgage his children's lands for clothing *thereafter to be furnished* either to him or them" (p. 567). And again, speaking of a note of hand which made part of the consideration of the mortgage (p. 568): "A promise to advance money at a future period is not money lent or advanced; and as this was *a power of a very extraordinary character, if not in derogation of common right*, no Court can extend it by construction. (See *Bloom* a. *Burdick*, 1 *Hill*, 140; 6 *Id.*, 415, *Rogers*

a. *Dill.*) The mortgage was therefore *beyond the authority* conferred, in respect of this note."

Whether T. B. Clarke be regarded as a trustee or a donee of a power, he was in either case incapable of aliening the estate, except in conformity with the acts.

III.—We are therefore exempted altogether from inquiring whether the testamentary trustees could have conveyed away the legal title of every part of the estate; for, most certainly, when Clarke took their place, he took it with these limitations upon his authority: *first*, that one-half of the estate should, at the outset, be set apart to be held inalienable during his life; and, *second*, that he might deal with the other half in such manner and such only as he was authorized to do by the acts in question. Upon this point all the cases agree—those in the State Courts, as well as those in the Federal Courts. It had else been quite unnecessary, in the different actions of ejectment, to inquire into Clarke's authority, further than to see that he was trustee. But it will be observed, in looking through the cases, that, beginning with *Clarke* a. *Van Surlay*, 15 *Wend.*, and coming down through *Cochran* a. *Van Surlay*, 20 *Wend.*, to *Towle* a. *Farney*, 14 *N. Y.*, every Judge has occupied himself, chiefly, with the inquiry whether Clarke's acts were within the statutes; an inquiry quite superfluous, if his authority as trustee was unfettered by the other provisions.

In *Clarke* a. *Van Surlay*, 15 *Wend.*, 448, the Court say: "The only remaining inquiry is, whether the deed of Clarke to De Grasse, under which the defendant claims, was made in pursuance of the order of the Chancellor." In *Cochran* a. *Van Surlay* 20 *Wend.* (p. 379), the Chancellor says: "The only doubt I have had in this case, was upon the question whether, by the order of the 15th of March, 1817, the Chancellor did not intend to require *every sale for cash* to be approved by a Master, *as well as sales* or conveyances which might be made by the trustee *in payment or satisfaction of debts.* Upon this point I concur, though with some hesitation," &c.

Senator VERPLANCK says (p. 386): "The sale and conveyance under which the defendant claims title are impeached as wholly *void, because not made in conformity* with the express directions of the Chancellor in his orders. I cannot but consider this objection fatal to the *legal title* of the defendant, as it now stands;" and he then goes on to show, that the order plainly requires the approval of a Master upon every deed or mortgage, and, for want of it, he considers the deed in that case a nullity.

In *Towle* agst. *Farney*, 14 *N. Y.*, 426, DENIO, C. J., says: "The *authority* was to sell the lots to raise money to pay debts which Clarke had incurred or might incur for the support of his family; and the sale and conveyance made *under that authority* was held to be effectual to pass the title," and on p. 427: "It seems clear to me, that the design was that the master should pass upon the propriety of the sale in reference to all the circumstances bearing upon that question, and that the certificate ought to import the exercise of that judgment. If the question were *res nova*, I should adopt the construction which would require the concurrence of the master in all cases of a disposition of land under the order of the Chancellor. But a more restricted meaning has been given to the paper, and for the reasons before mentioned I think we are not at liberty to review that decision."

All this reasoning was wholly thrown away, if Clarke's position as trustee, holding the legal title, supposing that to have been his real relation to the property, enabled him to convey a legal title, in disregard of the special provisions and limitations of the acts.

In *Clarke* a. *Davenport*, 1 *Bosw.*, 101, the Court say of the second act: "Under the provisions of this act no sale could be made by Clarke as trustee without the previous assent of the Chancellor." Again, p. 102: "It is to be observed that the *authority* so far given to Clarke was limited to sales, and for the purpose of enlarging his power as trustee, the Legislature upon his application passed the third act, that authorizing a mortgage.

In this Court, it is unnecessary to say, a much more restricted view of Clarke's authority has been taken than was taken in the State Courts, so that on all hands we find complete unanimity, upon the point of Clarke's limited authority, whether that authority be held a power or a trust.

Limitations upon the power of trustees and even of owners of estates were not of infrequent occurrence. (*See Prince's Case*, 8 *Coke*, 1.) The lands of religious corporations and of Indians are, in the State of New York, incapable of alienation, except upon the assent of the Judges or other magistrates.

2 R. S. 244, § 11.

Voorhees and wife *a.* The Presbyterian Church of Amsterdam and others, 8 Barb., 135.

In the matter of the petition of the Ministers, Elders and Deacons of the Reformed Dutch Church in Saugerties, 16 Barb. 248.

There is now a general law of New York that a conveyance by a trustee in contravention of the trust is void (1 *R. S.*, 730, § 65). This is but an extension to all cases of the principle established for this case by these private acts.

Indeed, it was possible at common law to restrict by a private assurance the right of subsequent alienation.

"A condition annexed to an estate in fee prohibiting all alienation is void (*Co. Litt.*, 223*a.*) But it seems that the estate may thus be made inalienable for a certain time or to a particular person (1 *Bac. Abr.*, 647); or even under some circumstances to all the world except one person (*Doe* a. *Pearson*, 6 *East*, 173). So a condition not to marry a Scotchman, &c., has been allowed (*Perrin* a. *Lyon*, 9 *East*, 170)."

Burton on Real Property, 7*a*.

IV.—It is to be taken therefore as established, that

is to say, as a *postulate* from which we are to reason, that the *authority* of Thomas B. Clarke to partition the estate into two moieties, one of which was to be *held* by him, to the uses of the will, whether that authority be called in technical language a power or a trust, was *limited*, not only in an *equitable* but in a *legal* sense, so that he was *incapable* of conveying away the reserved moiety, or giving a legal title to it by any sale or conveyance whatever.

V.—Starting from this point, we have only to inquire whether the authority of Clarke, whether it be called "a special power to be strictly pursued" or a "limited trust," did, so far as regarded the division of the estate, admit of partition and re-partition, and any number of successive partitions, or whether a partition once made was final. The answer to this question depends first upon the particular language and purpose of this authority or power; and, second, upon the general doctrine of delegated authority in private affairs.

1. Upon the particular *language and purpose* of this authority or power.

The *language* is—

(*a*) That the trustee "shall *as soon as conveniently may be*, partition and divide." This seems to mean a single partition. If it could be repeated again and again, nothing was gained by the direction that the first should take place "as soon as conveniently may be."

(*b*) That upon the making of the partition, one moiety shall be *held* "*to the uses* and upon the trusts declared in and by the said Will," and therefore this reserved moiety became vested in the trustee for life, with equitable remainders to the children of Clarke, vested in them, and subject to open and let in after-born children. This is the construction given to the will both by the Courts of New York

and by the Circuit Court of the United States, and apparently acquiesced in by this Court (8 *How.* 509).

Williamson *a.* Field, 2 Sand. Ch., 533.

This being so, there was no longer power in the trustee to divest the remainder of the children. That half of the estate became absolutely inalienable.

(*c*) That "*the remaining moiety shall be subdivided*" into so many lots as the trustee "may think most likely to effect an advantageous sale thereof," and "after having completed such subdivision" and "within a convenient time thereafter not to exceed six months, except," &c., the trustee was "to sell and dispose of the said last mentioned subdivided moiety." The sale was to take place only after the trustee had "*completed* such subdivision." This can hardly mean anything less than that the subdivision once made was to be final.

Every person who purchased a lot of the trustee had a right to rely upon the division thus made. He bought according to the map or plan, and might justly insist that it should not be thrown aside.

The purpose of these provisions was manifestly, first, to secure one solid or compact half of the estate against the chance of alienation; second, to have *that half* determined and made known beforehand; and, third, to have a permanent map or plan of the *other half*, made convenient and attractive to purchasers. These purchasers would not and could not rely upon a shifting power which might act one way to day and another way to-morrow.

2. Upon the general doctrine of delegated authority in private affairs. This general doctrine is, that such an authority once exercised is exhausted unless there is something in the language which expressly or by neces-

sary implication declares it to be continuous. A few cases will make this clear.

(*a*) "An authority *once well executed cannot be executed de novo;* but where it is not well executed it may be acted again; as where *executors* by devise *have a bare power to sell land*, though *they make a feoffment*, yet they may sell afterwards; per VENTRIS, J., 5 *Mod.*, 457; 2 *W. & M.*, in *C. B.*, *Arg.* in case of *Tippet* a. *Eyres*. MARGINAL NOTE.—*S. P.* seems admitted by ROKEBY, J., *Ibid.* *Ibid* 258, *S. P.* by POWELL, J. As, when the *lessee* for years will *not consent to the first livery*, the same *attorney may make livery again;* and cited *Palm.* 289, *Molyneux* a. *Tolin*. And so, if lands are given to J. S., *the remainder to such a person as he shall appoint*, and he *appoints a monk*, he may, notwithstanding, appoint again. So, if a letter of attorney be to deliver seisin, and the *attorney delivers seisin within the view*, which is no good execution of his authority, yet sure that does not hinder him from delivering seisin upon the land; per POLLEXFEN, Ch. J., 2 *Vent.*, 115; *Hil.* 1 & 2 *W. & M.*, in *C. B.* An *habere fac. possess. was executed* by the Sheriff in delivering a house; and after it was over,' it was discovered that a *person was hid in a room of the house*, whereupon he was turned out, and the Sheriff *delivered execution again:* per POLLEXFEN, Ch. J., 2 *Vent.*, 115; *Hil.* 1 & 2 *W. & M.*, in *C. B.*, cites *Palm.*, 289; that it was resolved to be well."

3 Viner's Abr., 423. *Authority* B., Pl. 42.

(*b*) Where an act of Parliament authorized the Speaker to give a certificate of the amount of costs to be paid by persons opposing unsuccessfully the return of a member, and two members had been returned from the same borough, and were opposed, and a certificate had been given to both jointly, which was held defective because

joint, and a new certificate was given to each, it was held that the new certificate was valid because the first was void. Lord ELLENBOROUGH said: "It is objected that the Speaker, having granted one certificate, could not grant another; and I admit, that if he had before granted an effective certificate, he would have been *functus officio*, and could not have granted another," &c. LE BLANC, J., said: "There is no dispute as to the principle upon which this case is to be decided. It is on a special authority given to the Speaker of the House of Commons; and if it be not well executed, by granting a valid certificate it may be executed again, until there be a valid execution of the authority."

Strackey *a.* Turlay, 11 East, 200.

(*c*) In *The People* a. *Woodruff*, 32 *N. Y.*, 355, it was held that the authority given by a special statute to the Comptroller to appoint Commissioners of Taxes, was exhausted by a single exercise thereof.

(*d*) The rule is also declared in—

Hele *a.* Bond, Prec. Ch. 474.

Hatcher *a.* Curtiss, Freeman's Ch., 61.

Duke of Marlborough *a.* Lord Godolphin, 2 Vesey Sr., 77.

Lord Teynham *a.* Webb, 2 Vesey Sr., 211.

Worrall *a.* Jacob, 3 Merivale, 270.

Smyth *a.* Taylor, 21 Ill., 296.

SECOND POINT.—The discharge of the trustees by the Legislature of New York was in contravention of that clause of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

1.—The portion of the Will of Mary Clarke, to which the acts related, was as follows:

"I give and devise unto the said Benjamin Moore, and Charity, his wife, and Elizabeth Maunsell, and their heirs for ever, as joint tenants, and not as tenants in common, all that certain lot of land, number eight in the said thirteenth allotment of the said patent, containing one hundred acres; also all that part of my said farm at Greenwich, aforesaid, called Chelsea, lying to the northward of the line, hereinbefore directed to be drawn from the Greenwich Road to the Hudson River, twelve feet to the northward of the fence, standing behind the house now occupied by John Hall, bounded southerly by the said line, northerly by the land of Cornelius Bay, easterly by the Greenwich Road, and Westerly by the Hudson, including that part of my said farm now under lease to Robert Lennox; also all my house and lot, with the appurtenances, known by number seven, within the limits of the prison, and now occupied by Thomas Byron, to have and to hold the said hereby devised premises to the said Benjamin Moore, and Charity, his wife, and Elizabeth Maunsell, and to the survivor or survivors of them, and the heirs of such survivor, as joint tenants, and not as tenants in common, in trust to receive the rents, issues, and profits thereof, and to pay the same to the said Thomas B. Clarke, natural son of my late son Clement, during his natural life, and from and after the death of the said Thomas B. Clarke, *in further trust to convey the same to the lawful issue of the said Thomas B. Clarke, living at his death, in fee:* and if the said Thomas B. Clarke shall not leave any lawful issue at the time of his death, then in the further trust and confidence, to convey the said hereby devised premises to my said grandson Clement C. Moore, and to his heirs, or to such person in fee as he may by will appoint, in case of his death prior to the death of the said Thomas B. Clarke."

Thomas B. Clarke died in 1826, as has been stated leaving three children: Catherine H., who was born June 5, 1807; Isabella M., who was born June 11, 1809; and Bayard, who was born March 17, 1815.

The defendant claims under a conveyance in fee, executed by Thomas B. Clarke, in 1818, to McIntyre.

When the conveyance by Clarke to McIntyre was executed, one of the trustees, Mrs. Moore, was still living. She died in 1838.

The defendant claims that Clarke's conveyance was sufficient, because these trustees had been discharged by these private acts of the Legislature of the State of New York, and Clarke substituted in their place, with power to sell.

Those portions of the acts by which this discharge and substitution were supposed to have been effected, are here given more fully than in the preceding statement.

Act of April 1, 1814: "Whereas, Mary Clarke, late of the City of New York, deceased, widow, and relict of Thomas Clarke, late of the same place, gentleman, deceased, in and by her last will and testament, bearing date the sixth day of April, in the year of our Lord, one thousand eight hundred and two, did among other things devise unto Benjamin Moore, and Charity, his wife, and to Elizabeth Maunsell, and to their heirs forever, certain lands and real estate; to have and to hold to the said Benjamin Moore, and Charity, his wife, and to the said Elizabeth Maunsell, and to the survivors or survivor of them, and to the heirs of such survivor, as joint tenants, and not as tenants in common, in trust to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, one of the devisees of the testatrix, during his natural life; and from and after the death of the said Thomas B. Clarke, in further trust, to convey the same to the lawful issue of the said Thomas B. Clarke, living at his death, in fee; and if the aaid Thomas B. Clarke should not have any lawful issue at the time of his death, then, in the further trust and confidence, to convey the said devised premises to Clement C. Moore, also one of the devisees of the said testatrix, and to his heirs, or to such person in fee, as he might by will appoint, in case of his death prior to that of the said Thomas B. Clarke. And whereas, it appears to the Legislature, that the property so devised as aforesaid is nearly

unproductive, and in the present situation is incapable of being improved, so as to yield an adequate income for the maintenance and support of the said Thomas B. Clarke and his family, whereby the benevolent intentions of the testatrix will be defeated, without the interposition and aid of the Legislature. And whereas, the said Benjamin Moore, and Charity, his wife, and the said Elizabeth Maunsell, the said trustees named in the said will, in and by a certain instrument under their hands and seals, bearing date and duly executed by them on the eleventh day of January last, did consent and agree to all such acts as the Legislature of this State should deem meet and proper to make for the benefit and relief of the said Thomas B. Clarke, or of his issue, heirs and assigns, in and concerning the premises; and also did, by the said instrument in writing, consent and desire that some other person or persons might be substituted for them, in their place and stead, as trustees aforesaid, and they be discharged from the said trust. And whereas, Clement C. Moore, the person named in the said Will, and entitled to the contingent remainder, hath, by a certain other instrument in writing, under his hand and seal, bearing date and duly executed by him on the said eleventh day of January last, consented and agreed to all such act or acts as the Legislature might deem proper to make for the benefit and relief of the said Thomas B. Clarke; therefore:

I. Be it enacted by the People of the State of New York, represented in Senate and Assembly, that it shall and may be lawful for the Court of Chancery, on the application of the said Thomas B. Clarke, to constitute and appoint one or more trustees to execute and perform the several trusts and duties specified, and set forth in the said in part-recited will and testament, and in this act, in the place and stead of the said Benjamin Moore, and Charity, his wife, and the said Elizabeth Maunsell, *who are hereby discharged from the trusts in the said will mentioned.* Provided, that it shall be lawful for the said Court, at any time thereafter, as occasion may require, to substitute and appoint other trustee or trustees in the

room of any of those appointed in this act, in like manner as is practiced in the said Court, in cases of trustees appointed therein; and such trustee or trustees so appointed are hereby vested with the like powers, as if he or they had been named and appointed in and by this Act."

The first and second sections of the Act of March 24, 1815, entitled "An Act supplemental to the Act for the Relief of Thomas B. Clarke," passed April 1, 1814, are as follows:

"I. Be it enacted by the People of the State of New York, represented in Senate and Assembly, that all the beneficial interest and estate of the said Clement C. Moore, or those under him, arising or to arise by virtue of the act, to which this is a supplement, or by the will mentioned in the said act, shall be, and the same is hereby vested in the said Thomas B. Clarke, his heirs and assigns; and so much of the act, to which this is a supplement, as is repugnant thereto, and so much thereof as requires the trustees to set apart and reserve a certain annual stipend out of the interest or income of the property thereby directed to be sold, for the purpose of creating an accumulating fund at compound interest during the life of the said Thomas B. Clarke, and *so much of the said act as requires the several duties therein enumerated, to be performed by trustees to be appointed by the Court of Chancery,* as therein mentioned, be, and the same is *hereby repealed.*"

"II. And be it further enacted, that *the said Thomas B. Clarke be, and he is hereby authorized and empowered to execute and perform every act, matter and thing, in relation to the real estate mentioned in the act to which this is a supplement, in like manner and with like effect that trustees duly appointed under the said act might have done;* and that the said Thomas B. Clarke apply the whole of the interest and income of the said property to the maintenance and support of his family, and the education of his children."

The third act is not material to the present inquiry.

The question is, whether, under the Constitution of the United States, the Legislature of New York could,

without the consent of the beneficiaries, discharge the testamentary trustees from all their obligations to them.

II.—*This question is quite independent of any question of the power of the Legislature to authorize the sale of the property by the testamentary trustees for the education and support of the children.* It steers clear therefore of *Stanley* agst. *Colt*, 5 *Wall.* 119, and of other cases in this Court, in which it has been held, that the State Legislatures have power to pass laws for the unfettering of estates, or for their sale and the application of their proceeds to the necessities of their owners, they being incapable of selling. All these cases rest upon principles not involved in the present case. In none of them, it is believed, was there an attempt to release a trustee or any other contracting party from the obligation of his own contract.

If, in the present case, the testamentary trustees, instead of asking to be discharged from their obligations, had asked that they might be authorized to sell half of the estate and use the proceeds in place of the land, the question then presented would have been such as has been presented to this Court before. But the present case is novel in its essential features. The sale of the estate was coupled with the discharge of the trustees, who consented to the sale only on condition that they should be held responsible neither for the manner of the sale, nor for the disposition of the proceeds; in short, they asked that the Legislature take from their shoulders the burthen of the obligation which they took upon themselves under the will, and virtually say, "let us escape, and you may do what you please with the property confided to our care."

If the testamentary trustees had not been discharged there would either have been no sale of the estate; or supposing them to have received authority to sell, they would doubtless have divided the estate in a proper manner, would have sold only in the proper moiety, and then so much as was necessary and no more, and would have made a proper application of the proceeds. *Their discharge gave the children up to pillage.*

Apart, however, from all speculation of what might or might not have happened, if the trustees had not been discharged, it is sufficient that their discharge is one of the links in the chain of title of the defendant, and if that is invalid, the plaintiffs' right to the property of their ancestor and devisor has not been taken away.

III.—Let us, at the outset, fix in our minds with precision, the engagement of the trustees towards the beneficiaries. At the time of passing the act of discharge, which was the first act of the series, and passed in April, 1814, two of Mr. Clarke's children, original plaintiffs in the present suit, were living; the third was yet unborn.

The two children already born, had vested equitable remainders in fee simple, subject to open and let in the after-born child. For the unborn child, there was then only a possibility, which at his birth ripened into a vested equitable remainder, like that of his sisters. Such is the construction given to the will, in both the State and Federal Courts. Vice-Chancellor SANDFORD examines its provisions with great care in *Williamson* a. *Field*, 2 *Sandf. Ch.*, 562. Mr. Justice DUER in 1 *Bosworth*, 113, explains very fully the views of the State Courts, and it may not be inappropriate to quote his language.

"It has already been shown that the Legislature, by the act of 1815, not merely declared Clarke to be a trustee, but clothed him as such, with all the rights, powers and *estate* that were vested in the original trustees, by the will of Mary Clarke; and we concur with Chancellor Walworth and Vice-Chancellor Sandford, in the opinion, that by force of the Statute, Clarke became seised of the legal estate in the remainder in fee expectant, on his own life estate, and that the remainder devised to his children (although vested as they came into being) was purely equitable—*Opinion Chan. Walworth*, 20 *Wendell Rep.*, 377: *Williamson* a. *Field*, 2 *Sandf. Ch.*, 533: *Opinion V. Chan.*, p. 562, and *passim*. Nor, as it seems to us, can the words of the statute be satisfied by any other construction.

"I readily admit, however, that in judging of the nature and extent of Clarke's interest or estate, we are

not to look merely at the words of the statute, but that its reasonable construction is, that it was not the intention of the Legislature to give to Clarke any other or greater estate than that which was devised to the original trustees. It is upon the true construction, therefore, of this devise, that the question turns. If, by its legal interpretation, the estate of the trustee was to last no longer than during the life of Clarke, and the remainder in fee was devised to his children as a legal estate, the truth of the conclusion that in respect to this remainder he was the donee of a power, and not a trustee in the full sense of the term, will not be contested; but, on the other hand, it is certain that if by force of the will the original trustees took a fee, it is to this fee that, by force of the statute, Clarke succeeded.

"The devise in the will, we have seen, was to the trustees and their heirs, in trust, to receive and pay over the rents and profits to Clarke during his life, and upon his death to convey the fee to his children then living. Such a devise under the Revised Statutes, would be valid, as a trust, only during the lifetime of the parent, and upon his death, would vest the fee, as a legal estate, in the children then living, without any conveyance or other act on the part of the trustees or their heirs. The estate of the trustee, although a fee in its terms, would be limited in its duration by the life of the person for whom the rents and profits were to be received; and if a power to sell the remainder in fee were given to the trustees, it would be valid, if valid at all, as a power only, and not as an authority connected with, and flowing from their estate.

"But the state of the law was widely different when the will of Mrs. Clarke took effect, and it continued to be so many years after the death of Clarke; and it is the law, as it existed before the Revised Statutes were in force, that must determine the question we are now considering. Previous to the Revised Statutes, it had, for a long time, been settled that a trust to convey lands, whether immediately or on a future day certain was valid as an active trust, and was not a use, that the statute would execute as a legal estate in the person en-

titled to demand the conveyance." (*Garth* a. *Baldwin*, 2 *Vesey*, 646; *Mott* agst. *Buxton*, 7 *Vesey*, 201; *Fearne*, *Con. Rem.*, 123; *Lewin on Trusts*, 145.)

"The fee, therefore, which the trustees took under the will, was not determinable by the death of Clarke; but although upon his death his children then living would have been deemed in equity the absolute owners, the fee, as a legal estate, had not the trustees been dischared, would have remained *until conveyed* to them and their heirs. They were trustees, therefore, of the estate of the children, that is, trustees of the remainder in fee, and it was their estate as such trustees, and not a naked power that the act of 1815 transferred to and vested in Clarke" (pp. 113, 114, 115).

The trust with which the testamentary trustees were clothed, being, as thus explained, an active trust towards the beneficiaries, what were these trustees bound to do, or, in other words, what was their contract with these children? It was, first, to *take care* of the estate; and, second, to *convey and deliver* it to the children on the death of their father. The trustees covenanted with the children to do these things, as firmly as if they had executed a bond to them by name, expressing in full legal phrases these different engagements.

IV.—*The Legislature of New York assumed to release the trustees from this contract.* If they had not been released, the plaintiffs would now be entitled to recover in this action, because the land would have been held by the trustees until the death of Clarke, and then they would have conveyed it to the children; or, in 1830, by force of the Revised Statutes, the legal estate would have become vested in the children without a conveyance.

V.—If it be suggested, that possibly the testamentary trustees, had they continued in this trust, would have been authorized to do the same thing which the substituted trustee did, and would have done it, that is to say, would have conveyed away the children's property wastefully and without consideration, we reply, that is mere conjec-

ture; and if it were not, it makes no difference in the argument. Such result is not certain. It is not even probable. The reason for getting rid of the testamentary trustees is patent upon the face of the transaction; and that was, that some other person might do what they were too responsible to engage in, and would not themselves do.

VI.—The question then becomes simply this: Can a State release a trustee from his engagements to the beneficiaries in the trust, without their consent? The pretence that these children did consent, if such a pretence be made, has no foundation. One of them was not even born. The other two were not capable of consenting; and if a guardian had been appointed, and had consented, and his consent had been sufficient, which is not admitted, the children would at least have had the guardian to look to for their indemnity. To call their father their guardian, so as to make his consent sufficient for putting their property into his hands, is a mockery. To say that the Legislature was their guardian, and that it consented while it discharged, at one and the same time, is to say that the Legislature of any State may discharge, at pleasure, any engagement towards minors, married women, and all other persons under disability; and is to take away the safeguards of the Constitution from those who need them most.

There was in the case no consent, real or pretended. Without it, could the trustees be released from their engagements? Or, in other words, was the contract between the trustees and the beneficiaries a contract within the meaning of the Constitution; one, the obligation of which the States are forbidden to impair?

VII.—In considering this question, it will be the endeavor of the plaintiffs to show:

1. That the devise in trust, and its acceptance, created a contract between the trustees and the beneficiaries, recognized by the law, and enforceable in the Courts.

2. That such a contract is one of those which the Constitution guarantees. And,

3. That it would make no difference in the argument, if it could be shown, that the contract was capable of dissolution by legal processes in the Courts.

1.—The devise in trust, and the acceptance of it, created a contract between the trustees and the children of Thomas B. Clarke, recognized by the law, and enforceable in the Courts.

(*a*) The trustees not only assumed an office, but they entered into a contract. By the acceptance of the trust, they engaged, as has been already stated, to take care of the estate, and to convey and deliver it to the children of Clarke at his death. Their legal estate not being executed by the statute of uses, a conveyance was to be made by them on the death of the equitable life-tenant, either to his children, or, in the alternative, to Clement C. Moore. The trust was not passive, but active.

(*b*) Two of the trustees being, under the Will, devisees for their own use, could not have renounced the devise in trust, while they accepted the devise for their own benefit.

Doyle *v.* Bliss, 2 Sch. & Lefroy, 236.
Reed *v.* Truelove, Ambler, 217.

(*c*) It is wholly immaterial whether their contract was cognizable in a Court of Law, or only in a Court of Equity. It is enough, that it was an engagement binding upon the trustees, and enforceable in some of the tribunals.

Nor is it material that the trustees did not contract with the infant beneficiaries in person. The cases are numerous where it has been held, even at law, that on a promise to one for the benefit of another, an action may be brought by the latter.

It is a principle of law long recognized and well established, that where one, for a good

consideration, engages with another to do some act for the benefit of a third, the latter may maintain an action for the breach of the engagement. The rule does not rest on any actual or supposed relationship between the parties, nor upon the reason that the defendant, by entering into such agreement, has, by implication, made himself the agent of the plaintiff; but upon the broader and surer basis, that the law, interpreting the act of the parties, discovers the real privity and duty, and deduces, by a necessary conclusion, the existence of the contract upon which the action is founded. The essential consideration, in many cases of this character, for the promise to the beneficiary, is the assumption of a trust created for his advantage.

In the old and familiar case of *Dutton et ux.* a. *Pool*, 1 *Ventris*, 318, 333, the plaintiff declared that his wife's father was seized of certain lands (now descended to the defendant), and being about to cut £1,000 worth of timber off the lands, to raise a portion for his daughter, the defendant promised the father, in consideration that he would forbear to fell the timber, that he would pay the daughter the £1,000. The Court held, after advisement, that the daughter could maintain the action. *Dutton* a. *Pool* was reaffirmed by Lord MANSFIELD, in *Martyn* a. *Hind*, *Cowper*, 443, where he observed, that it was a matter of surprise how a doubt could have arisen in that case. The case then before the Court was this: The plaintiff declared, that, upon an instrument in writing, the defendant promised the plaintiff to retain him as curate, and pay him £50 *per annum*. The instrument produced in evidence was a certificate addressed to the Bishop, whereby the defendant nominated the plaintiff, and promised to allow him £50. Lord MANSFIELD said there was "no shadow of objection to the plaintiff's maintaining the action; the *contract* was with the curate." So, where one promised a father, that,

in consideration that he would release a copyhold to the defendant, the defendant would pay his two daughters £20 apiece; one of the daughters maintained an action (*Styles*, 491). See, also, *Rookwood's* case, *Cro. Eliz.*, 164; *Oldham* a. *Bateman*, 1 *Rol. Abr.*, 31. In *Felton* a. *Dickinson*, 10 *Mass.*, 280, the father of the plaintiff placed him in the service of the defendant, upon an agreement that the plaintiff should remain with him until his majority; and the defendant promised to support the plaintiff during the time, and at the end of it to pay him £200. It was held, that "the objection that the contract was made with the father had no validity. It is clear, though the father contracted for the son, that he had in view the son's advantage, and not his own. The money was to be paid to the son upon the termination of his minority. Now, when a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for the breach."

In a discriminating opinion in *Mellen* a. *Whipple*, 1 *Gray*, 317, Judge METCALF described the cases above referred to, and those of a similar character, as those where "promises have been made to a father or uncle, for the benefit of a child or nephew, and in which the person, for whose benefit the promise was made, has maintained an action for the breach of it. The nearness of the relation between the promisor and him for whose benefit the promise was made, has been sometimes assigned as a reason for these decisions, and though different opinions, both as to the correctness of the decisions, and as to this reason for them, have often been expressed, yet the decisions themselves have never been overruled, but are still regarded as settled law."

These cases are also referred to in *Lawrence* a. *Fox*, 20 *N. Y.*, 274, as "cases of trusts," in which "the duty of the trustee to pay the *cestuis*

que trust, according to the terms of the trust, implies his promise to the latter to do so." In the same case, COMSTOCK, J., though he dissented from the opinion of the other Judges in the case before the Court, concedes that in "cases in which some trust was involved," where, for example, "A delivers money or property to B, which the latter accepts upon trust for the benefit of C, the latter can enforce the trust by an appropriate action for that purpose. If the trust be of money, the beneficiary may assent to it, and bring the action for money had and received to his use. If it is of something else than money, the trustee must account for it according to the terms of the trust, and upon principles of equity." See also *Farley* a. *Cleaveland*, 4 *Cowen*, 432; *S. C.*, 9 *Id.*, 639; *Berly* a. *Taylor*, 5 *Hill*, 577; *Delaware and Hudson Canal Co.* a. *Westchester Bank*, 4 *Denio*, 97.

The principle involved in the foregoing cases is also illustrated by those familiar instances of contracts, in which A, for example, has placed money or property in B's hands, as a fund from which A's *creditors* are to be paid. In these cases, B's acceptance of the money or property, without objection to the terms on which it was delivered, or, in other words, his undertaking to execute the trust to which the property is devoted, implies his promise to pay the creditors, and on this ground creditors have their actions against the holders of such funds. Thus in *Hall* v. *Marston*, 17 *Mass.*, 575, A owed to the defendant $1,300, and to the plaintiff $400. He remitted to the former a bill for $1,000, with directions to pay the plaintiff $200. The defendant neglected to do so. It was held, that the defendant was liable to the plaintiff for $200 in an action for money had and received, for "whenever one has in his hands the money of another, which he ought to pay over, he is liable to this action,

although he has never seen or heard of the party who has the right. When the fact is proved that he has the money, if he cannot show that he has legal or equitable ground for retaining it, the law creates the privity and the promise." So in *Arnold* a. *Lyman*, 17 *Mass.*, 400, A, a debtor to B, conveys property to C, who, in consideration thereof, engages to pay certain debts of A, and particularly one which he owes to B. Held, C was liable, in *assumpsit*, for the amount of A's debt. "There was a sufficient consideration for the promise. The goods of A, which in his hands are liable for his debts, were transferred to C, and put into his possession. The promise may be legally considered as made to the several creditors, whose debts the defendant undertook to pay." (See *Brewer* a. *Dyer*, 7 *Cushing*, 340; *Carnegie* a. *Morrison*, 2 *Metc.*, 389.)

The same implication of contract between trustee and beneficiary, which is contended for in the present case, is further illustrated by the law of bailments; and it may be observed, in passing, that the trusts, such as that involved in the case now before Court ("technical trusts," BLACKSTONE terms them, which, "originally forced into equity, have remained ever since a kind of *peculium* in those Courts"), do not differ in their essential character from the well-recognized contracts of bailments. (3 *Blackstone Comm.*, 431, 432; *Ashley* a. *Denton*, 1 *Litt.*, 88.)

In the bailment called deposit, the contract is "to keep the goods delivered, and to dispose of them according to the object or purpose of the original trust; for the deposit may be for the benefit of a third person, and to be delivered to him when demanded." (*Story, Bailments*, § 41.) "And if A delivered goods to B, to be delivered over to C, then C hath the property, and may demand the goods, though no action lies, unless

there be a clear assent on the part of B to such undertaking." (§ 103.)

Now, conceding that, according to the course of the law, the remedy of a beneficiary under a "technical trust" is in equity alone; yet the obligation upon which he proceeds does not differ in its essential character from that of those other trusts, bailments, assignments, and the like, which may be enforced in Courts of Law. The engagement of a trustee, in the sense of the present trust, is substantially the same as that of an assignee, depositary or other bailee.

To originate a trust in the technical sense of equity, "two things," says Adams (*Equity, Introduction, xxxviii*), "are essential; first, that the ownership conferred be coupled with a trust, either declared by the parties or resulting by presumption of law; and second, that it be accepted on those terms by the trustees." So that a trustee is defined to be "a person holding the legal title to property, under the express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, that is, the *cestui que trust*" (*Story, Contracts*, §296). In the present case, the trustees accepted the ownership conferred by the will of the testatrix, coupled with the express trust, "to receive the rents, issues and profits of the lands, and to pay the same to Thomas B. Clarke during his natural life, and from and after the death of the said Thomas B. Clarke, to convey the same to the lawful issue of the said Thomas B. Clarke, living at his death, in fee." They entered upon the execution of the trust according to its tenor, and this act alone involves a sufficient consideration for their engagement to perform it specifically. As, then, the trustees engaged, for a sufficient consideration, to execute certain trusts for the benefit of the children of Thomas B. Clarke, it is clear in the light, and upon the authority, of the analogous cases re-

ferred to, that the relation between them and the children was that of a contract, whatever be the definition given to that term.

2. This contract between the trustees and the children of Thomas B. Clarke, was within the protection of that provision of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

For the purpose of bringing under the eye at one view, some of the principal cases in which this provision has been applied to acts of State legislation, the following abstract is given:

The case of *Fletcher* a. *Peck*, 6 *Cranch*, 87, first brought this prohibitory clause of the Constitution into discussion. In 1795, an act of the Legislature of Georgia authorized the sale of certain public lands, and a grant was made in virtue of the act, to Gunn and others. Through mesne conveyances, lands included in the original grant came to Peck. He conveyed to Fletcher, by a deed which covenanted that the grant from the State was good, and that the title had not since been legally impaired. Fletcher assigned a breach of the covenant, in that an act of 1796 annulled the preceding act. The opinion of the Court was given by MARSHALL, C. J. "If," said he, "an act be done under a law, a succeeding Legislature cannot undo it. When a law is in its nature a contract, and absolute rights have vested under that contract, a repeal of the law cannot divest those rights, nor annihilate or impair the title acquired. * * A contract is a compact between two or more persons, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. A contract executed is one in which the object of contract is performed. A grant is a contract executed, the obligation of which still continues; and since the Constitution uses the general

term contract, without distinguishing between those which are executory and those which are executed, it must be construed to embrace the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors shall stand seized of their former estates, nothwithstanding their grants, would be as repugnant to the Constitution, as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. * * The words are general, and are applicable to contracts of every description."

It was decided, that the estate, held under the act of 1795, having passed into the hands of a *bona fide* purchaser for a valuable consideration, the State of Georgia was constitutionally disabled from passing any law, whereby the estate of the plaintiff could be legally impaired, or rendered void.

The next case that brought this clause of the Constitution into review, was that of *New Jersey* a. *Wilson*, 7 *Cranch*, 164.

A legislative act, which declared that certain lands to be purchased for the Indians should be exempt from taxes, was held to constitute a contract, which could not be rescinded by a subsequent act. * * "The privilege of exemption from taxation was annexed to the land, and the contract was certainly impaired by a law which would annul this essential part of it."

In *Territt* a. *Taylor*, 9 *Cranch*, 43, to use the language of Chancellor KENT, "the Supreme Court went again, and more largely, into the consideration of this delicate and interesting constitutional doctrine."

In 1770, lands were conveyed to certain persons for the use and benefit of the Episcopal Church of Alexandria. In 1776, a statute confirmed the rights of the church to all its lands and other property. In 1784, the Legislature passed an act for incorporating the church, by the third section

of which, power was given to the ministers and vestry of the church, to alien and improve any lands belonging to the church. An act of 1786, repealed the act of 1784, but saved to religious societies the property belonging to them, and authorized them to appoint trustees to manage their property, &c. The complainants claimed, under this last clause, the right to require the defendants to sell or otherwise dispose of the lands of the church.

Mr. Justice STORY delivered the opinion of the Court. He proceeded to show, that, according to the law in force prior to the revolution, the lands and other property vested in the church, according to the course of the common law; and though he conceded that the revolution might take away the public patronage, the exclusive care of souls, and the compulsive taxation for the support of the church, yet beyond these, the Court was not prepared to admit the justice or the authority of this exercise of legislation. But it was not necessary to rest the cause upon the general doctrine hitherto asserted; for, admitting that, by the revolution, the church lands devolved on the State, the statute of 1776 operated as a new grant and confirmation of them to the use of the church. "That the Legislature can repeal statutes, creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporation exclusively in the State, or dispose of the same to such purpose as they may please, without the consent or default of the corporation, we are not prepared to admit; and we think ourselves standing on the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the Constitution of the United States, and upon the decisions of the most respectable tribunals, in resisting such a doctrine."

Sturgis a. *Crowninshield*, 4 *Wheaton*, 122, was an action of *assumpsit* against the defendant, as the maker of two promissory notes. The defendant pleaded his discharge under an "act for the benefit of insolvent debtors and their widows," passed by the Legislature of New York.

By MARSHALL, Ch. J.: "To proceed to the great question on which this cause must depend, does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the Constitution of the United States? The act liberates the person of the debtor, and discharges him from all liability for any debt formerly contracted, on his surrendering his property in the manner it provides. *What is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction than those which are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract.* Any law which relieves a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it. The words of the Constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction." * * * * * *

"It has been contended that, as a contract can only bind a man to pay the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it. But it is not true, that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity constitute a fund, which is as confidently trusted as property itself. * * * * *

The argument drawn from the omission in the Constitution to prohibit the States from passing insolvent laws, admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the Constitution, to prohibit the passage of all insolvent laws, to enumerate particular subjects, to which the principle they intended to establish should apply. The principle was the inviolability of contracts. This principle was to be protected, in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation which should be forbidden, when it was intended to protect all. Had an enumeration of all the laws, which might violate contracts, been attempted, the provision must have been less complete, and involved in more perplexity than it now is. The plain and simple declaration, that no State shall pass any law impairing the obligation of contracts, includes insolvent laws and all other laws, so far as they infringe the principle the Convention intended to hold sacred."

In *McMillan* a. *McNeill*, 4 *Wheat.*, 209, the Supreme Court went a step further, and held that a discharge under a State insolvent law, existing when the debt was contracted, was equally a law impairing the obligation of contracts, and equally within the principle declared in *Sturgis* a. *Crowninshield.*

In *Trustees of Dartmouth College* a. *Woodward*, 4 *Wheat.*, 518, the plaintiff claimed under a charter, incorporating twelve persons by the name of the Trustees of Dartmouth College. The defendant claimed, under an act to amend the charter and enlarge and improve the corporation; the act increased the number of trustees to twenty-one, &c. It was held that the charter granted by the British Crown, was a contract within the

meaning of the Constitution, and protected by it: and that the act of the Legislature of New Hampshire, altering the charter in a material respect, without the consent of the corporation, was an act impairing the obligation of the charter, and consequently unconstitutional and void.

Respecting the impairing of the contract, it is said by the Court (p. 652), "Of the effect of this law, two opinions cannot be entertained. The act to amend the charter increased the number of trustees to twenty-one, gives the appointment of additional members to the Executive of the State, and creates a board of trustees to consist of twenty-five persons, of whom twenty-one are also appointed by the Executive of New Hampshire. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder expressed in the charter, to the Executive of New Hampshire. The management and application of the funds of the institution, which are placed by the donors in the hands of trustees, named in the charter, and empowered to perpetuate themselves, are placed by the act under the control of the Government of the State. The will of the State is substituted for the will of the donors in every essential operation of the college."

To the objection, that the charter could not be held to be a contract, in the sense contemplated by the Constitution, Mr. Justice STORY replies (p. 684), "It is not necessary that the consideration should be a benefit to the grantor. It is sufficient if it import loss or damage, or forbearance of benefit, or any act done or to be done on the part of the grantee. The relinquishment of property which a person holds, or controls the use of, as a trust, is a sufficient consideration, for it is parting with a legal right." Again (p. 692), "It may be admitted that two parties are necessary to form a perfect

contract; but it is denied that it is necessary that the assent of both parties must be at the same time. If the Legislature were voluntarily to grant land in fee to the first child of A, to be hereafter born; as soon as such child should be born, the title would vest in it. Would it be contended that such grant, when it took effect, was revocable and not an executed contract, upon the acceptance of the estate?" Again, on p. 696, "A general law, regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract (See *Holmes* a. *Lansing*, 3 *Johns. Ch.*, 73). It may be the only effectual mode of enforcing the obligations of the contract on both sides. A law permitting a breach of a contract by imposing a forfeiture of the rights acquired under it, or dissolving it, because the mutual obligations are no longer observed, is in no correct sense a law impairing the obligation of the contract." * * * (p. 697): "*In respect to grants and contracts, it would be far too narrow a construction of the Constitution to limit the prohibitory clause to such only where the parties take for their own private benefit. A grant to a private trustee for the benefit of a particular cestui trust que, or for any special private or public charity, cannot be the less a contract because the trustee takes nothing for his own benefit.* * * * There are many rights, franchises, and authorities which are valuable in contemplation of law, where no beneficial interest can accrue to the possessor. Thus, the grant of the next presentation to a church; a power of appointment, reserved in a marriage settlement either to a party or a stranger, to appoint uses in favor of third persons, without compensation, is another instance. *The grant of lands to a trustee to raise portions or pay debts, is in law a valuable grant, and conveys a legal estate.* * * *The truth is, all incorporeal hereditaments, whether*

they be immunities, dignities, offices, or franchises, or other rights, are deemed valuable in law. The owners have a legal estate and property in them, and legal remedies to support and recover them in case of any injury, obstruction, or disseisin of them. Whenever they are subjects of a contract or grant, they are just as much within the reach of the Constitution as any other grant. Nor is there any solid reason why a contract for the exercise of a mere authority, should not be just as much guarded as a contract for the use and dominion of property."

In *Farmers' and Mechanics' Bank* a. *Smith*, 6 *Wheat.*, 131, MARSHALL, C. J., reasserted the doctrine of the two preceding cases, from which he said the present was not distinguishable, except by the circumstance, that the defendant was a citizen of the same State with the plaintiff, at the time the contract was made in that State, and remained such, when the suit was commenced in its Courts. But these facts made no difference in the cases.

In *Green* a. *Biddle*, 8 *Wheat.*, 84, it was observed by the Court, that "*the objection to a law on the ground of its impairing the obligation of contracts could never depend upon the extent of the change which the law effects in it. Any deviation from its terms* by postponing or accelerating the period of performance which it prescribes, *imposing conditions not expressed in the contracts, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, or upon any parcel of it, impairs its obligation.* To deny any remedy under a contract, or, by burdening the remedy with new conditions and restrictions, to make it useless or hardly worth pursuing, is equally a violation of the Constitution."

In *Ogden* a. *Saunders*, 12 *Wheaton*, 257, adopting the language of Chief Justice MARSHALL, in the case of *Sturges* a. *Crowninshield*, Mr. Justice Wash-

ington defines "*the obligation of a contract as the law which binds the parties to perform their agreement.* It is the municipal law of the State, whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, whenever its performance is sought to be enforced. It forms in my humble opinion a part of the contract, and travels with it wherever the parties to it may be found." * * * *

By JOHNSON, J., p. 281.—"*Whatever by my contract I give another a right to require of me, I by that act lay myself under an obligation to yield and bestow. The obligation of my contract will then consist of that right or power over my will or action, which I, by my contract, confer upon another. And that right or power will be found to be measured neither by the moral law alone, nor by the universal law alone, nor by the law of society alone, but by a combination of the three:* an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society, by the positive law."

In *Gantly's Lessee* a. *Ewing*, 3 *How.*, 707, it was held that, as to existing mortgages foreclosable by a sale, the Legislature could not prohibit the sale for less than half the appraised value of the land, because such a law impairs the obligation of a contract. The Court said: "The new remedy presented by the Act of 1841 changed the contract, and required, among other things, that the mortgaged premises should not be sold to satisfy the debt, unless they were first valued, and one-half of that value was first bid for them. If the Legislature could make this alteration in the contract, and in the decree enforcing it, so it could declare that the property should bring its entire value, or that it should not be sold at all, thereby impairing or defeating the obligation, under the disguise of regulating

the remedy. The Court held, in *Bronson* a. *Kinzie*, 1 *How.*, 319, that the right, and a remedy substantially in accordance with the right, were equally parts of the contract, secured by the laws of the State when it was made; and that a change of these laws, imposing conditions and restrictions on the mortgagee, in the enforcement of his contract, and which affected its substance, impaired the obligation, and could not prevail, as an act directly prohibited could not be done indirectly."

In *Bronson* agst. *Kinzie*, 1 *How.*, 315, Chief Justice TANEY, delivering the opinion of the Court, says: "As concerns the obligations of the contract upon which this controversy has arisen, they depend upon the laws of Illinois as they stood at the time the mortgage deed was executed. The money due was indeed to be paid in New York. But the mortgage given to secure the debt was made in Illinois for real property situated in that State; and the rights which the mortgagees acquired in the premises depend upon the laws of that State. In other words, the existing laws of Illinois created and defined the legal and equitable obligations of the mortgage contract."

In *Planters' Bank* a. *Sharp*, 6 *How.*, 301, it was held, that where a charter gave a bank power to take and dispose of notes, a subsequent statute prohibiting any bank from transferring a note impaired the obligation of the charter.

In *Woodruff* a. *Trapnall*, 10 *How.*, 204, it was held that a provision in the charter of the Bank of Arkansas, which declared that its notes should be received in payment of debts due the State, created a contract between the State and the holders of the notes, which the State could not break.

In *Curran* a. *State of Arkansas*, 15 *How.*, 304, it was held that a statute which vested in the State all title to real estate and other property taken by

the bank in payment of debts due to it was an infringement of the Constitution, though the State was the sole stockholder, and that the State had no right to pass the law either as a creditor of the bank or as a trustee taking possession of the real estate for the benefit of all the creditors.

In the *Jefferson Branch Bank* a. *Skelly*, 1 *Black*, 436, which was one of the cases where an attempt was made to tax a bank beyond the amount stipulated in its charter, it was held that the rule which makes the construction given by State Courts to State laws and constitutions the rule for the federal courts, does not extend to cases in which this Court is called on to interpret the contracts of States, though they have been made in the form of laws or by functionaries of the State in pursuance of State laws.

In *Hawthorne* a. *Calef*, 2 *Wall.*, 10, it was held that a State statute repealing a former statute, which made the stock of stockholders in a chartered company liable for the debts of the Company is, as respects creditors existing at the time of the repeal, a law impairing the obligation of contracts. In its care to maintain inviolate the integrity of contracts, the Supreme Court has enforced the constitutional prohibition now in question in those cases where state legislation, though assuming to concern remedies only, has, in fact, impaired the substantial obligation of contracts.

McCracken *a.* Hayward, 2 How., 608.
Howard *a.* Bugbee, 24 How., 461.

So in cases where the State has engaged, by a grant or statute, that lands or corporate franchises and property shall be exempt from taxation, a law, afterwards made to tax them, is within the inhibition of the Constitution and therefore void. Thus an act of the Legislature of Maryland provided that "upon any of the aforesaid banks accepting

and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." And it was held, that a tax upon the stockholders, by reason of their stock, was a violation of the contract, and the tax was illegal.

Gordon *a.* Appeal Tax Court, 3 How., 133.
State Bank of Ohio *a.* Knoop, 16 How., 369.
Dodge *a.* Woolsey, 18 How., 331.
McGee *a.* Mathis, 4 Wallace, 143.
Van Hoffman *a.* Quincy, 4 Wallace, 535.

Similar decisions have been made in the State Courts upon the effect of legislation which has attempted to repeal charters of incorporation;

New Gloucester School Fund *a.* Bradbury, 2 Fairfield, 124.
Norris *a.* Trustees of Abingdon Academy, 7 Gill & Johns., 7.
Yarmouth *a.* New Yarmouth, 34 Maine, 411.

or to impose taxes upon property or franchises, which have been exempted from taxation by express stipulation;

Atwater *a.* Woodbridge, 6 Conn., 223.
Osborn *a.* Humphrey, 7 Conn., 335.
London *a.* Litchfield, 11 do., 251.

to change the government and control of trusts and charities fixed by previous charters or acts of incorporation;

Brown *a.* Hummell, 6 Penn. St., 86.

to change materially or take away all remedy for enforcing an obligation;

Commercial Bank *a.* Chambers, 8 Sm. & M., 10.
McKinney *a.* Carroll, 5 Monroe, 97.
Blair *a.* Williams, 4 Littell, 34.
Greenfield *a.* Dorris, 1 Sneed, 548.

In the case of *Fletcher* a. *Burlington and Rutland*

Railroad, not yet reported, before the Chancellor of Vermont, assisted by the Judges of the Supreme Court, it was held that a railroad mortgage to trustees created a contract between the trustees, the corporation and the bond-holders; that is to say, between the trustees, the creators of the trust and the beneficiaries; that such contract was within the Constitution of the United States; and that an act of the Legislature of Vermont was unconstitutional, which provided that, if the trustees did not call an annual meeting of the bondholders, as provided by the act, new trustees might be nominated, who should, when confirmed by the Chancellor, take possession of the railroad. The opinion in that case, of which a copy has been published in pamphlet, referred to the cases of

Trustees of Gloucester School Fund *a.* Bradbury, 2 Fairfield, 118.
Pawlett *a.* Clark, 9 Cranch, 294.
Hampshire *a.* Franklin, 16 Mass., 59.
Allen *a.* McKeen, 1 Sumn., 296.
Richardson *a.* Brown, 6 Greenl., 355.
Norris *a.* Abingdon Academy, 7 Gill and Johns., 14.
The Regents of the University of Maryland *a.* Williams, 9 Gill and Johns., 365.
Louisville *a.* University, 15 B. Mon., 642.
Commonwealth *a.* Clapham, 1 Harr., 133.
Brown *a.* Hummel, 6 Penn. St., 86.
Pultny *a.* Wells, 1 Aiken, 180.
Montpelier *a.* East Montpelier, 27 Verm., 710.

These cases have been thus collected and brought in one group before the Court, though at the risk of repeating what is already better known to the judges, that it might be seen how uniform has been the course of judicial decision upon the question, and how careful the Courts have been to throw the shield of the Constitution over all the engagements, by which one man binds himself towards another. *The absolute inviolability of contracts is an American principle*, first engrafted on an Ameri-

can Constitution, and this Court, it is not to be doubted, will cling to it and uphold it.

That inviolability has been impugned by these acts which attempt to release the trustees under the will of Mrs. Clarke, from their engagements towards their beneficiaries. The principle may be further illustrated by a supposed case. If A, a debtor, make an assignment to B, in trust for the payment of a debt to C, and B accept the assignment, C has a claim which he can enforce against B for the proper dispostion of the property assigned. But if, by a private statute, it were to be enacted, without C's consent, that B should be released, and D substituted in his place, the rights of C would be essentially changed. The pecuniary responsibility, the capacity, the integrity of D might be far different from the responsibility, capacity and integrity of B. And whether they were or not, the State has no more right to change the person who is to perform the obligation, than it has to change one's debtor; as, for example, to release E and place F in his stead as the debtor of G.

III.—It would make no difference in the argument if it could be shown that the contract of the testamentary trustees was susceptible of dissolution by legal processes, in the courts. In other words, it would not prove the validity of these private statutes, if it were to be made clear that the judicial department of the government could have done the same thing under the same circumstances. If the judiciary had intervened, all that it could have done was to apply the existing law to existing facts. It could neither make the law nor invent the facts. The Courts may in certain cases discharge one of the parties from the further performance of a contract, on some ground of equity affording cause for rescission; but it does that by virtue of some antecedent

law which provides for the extinguishment of the contract, by another mode than its performance. But, even in these cases, it cannot with justice be said, that the contract is broken in upon by the judicial action; for the antecedent law enters into the contract. The latter may be said, indeed, to have been undertaken with reference to the law, which is in a manner incorporated in the contract. Upon this principle, the Court has held in numerous cases that a State insolvent law, is valid between its own citizens as to *future* contracts, but not as to those which are past.

Sturges *a.* Crowninshield, 4 Wh., 122.
McMillan *a.* McNeal, 4 Wh., 209.
Ogden *a.* Saunders, 12 Wh., 213.
Gilman *a.* Lockwood, 4 Wallace, 409.

What the Constitution prohibits is a State *passing* a law, which impairs the obligation of a contract. A statute which discharges a contract without performance, or otherwise than in pursuance of pre-existing law, is a law impairing its obligation. The statute now under consideration, is, therefore, within the inhibition of the Constitution, whether there was or was not at the time a legal mode by which the trustees could have procured their discharge, through the action of the Courts.

1.—In many of the cases, in which this Court has applied the constitutional prohibition to acts of State legislation, it was perhaps competent to obtain a like end by judicial action; but that was not thought a reason for deeming the acts valid. Take, for example, the Dartmouth College case. There, upon a *quo warranto* in a court of law, or by a suit in equity, it was competent for the Courts of New Hampshire in certain circumstances to annul the grant or control the trustees. Mr. Webster arguing, said, "the judicial establishments of the State are presumed to be competent to prevent abuses and

violations of trust, in cases of this kind as well as in all others. If they be not, they are imperfect, and their amendment would be a most proper subject for legislative wisdom" (p. 596). Mr. Wirt said, "a contract is always for the benefit and advantage of some person. This contract cannot be for the benefit of the trustees. It is for the use of the people. The *cestui qui use* is always the contracting party; the trustee has nothing to do with stipulating the terms" (p. 611).

In *Martin* a. *The Somerville Water Power Co.*, decided by Mr. Justice GRIER, in the New Jersey Circuit (27 *How. P. R. N. Y.*, 163), an estate which had been mortgaged for the payment of certain bonds had become so incumbered by judgments, decrees, Sheriff's sales and injunctions that it was deemed almost impossible to make a title thereto by means of regular legal proceedings in the State Courts, and the Legislature was resorted to for aid. An act was subsequently passed by the Legislature authorizing Commissioners to sell the estate by auction "free from all incumbrances, and, after paying expenses and certain costs, to distribute the proceeds among the creditors, according to the priorities of their several liens." This act, it was held, impaired the obligation of the contract between the Company mortgaging and the bondholders. The learned Judge, in delivering judgment, says of the statute, that "it sets forth in the preamble certain representations, made, no doubt, by those who procured the act, showing plausible reasons for such legislative interference. But the validity of the act must be judged from its actual operation on the rights of parties subjected to it, and not by the pretences set forth by the preamble. They may show that the Legislature acted in good faith, and believing that their interference would injure no one, but not that such was the actual result.

> Legislatures cannot be too cautious when asked to interfere by special legislation for particular persons in particular cases on *ex parte* representations. They cannot call all parties before them, and judge upon a full hearing. *This is for the Courts.* Their action may not always be unjust, but it may be and often is tyrannical and injurious" (p. 166). And in another part of his opinion he says: "This act may be remedial as to the owners of the equity of redemption and those having liens against it, but the mortgagees have a right to say, *non in haec federa veni*" (p. 168).

2.—There was, however, at the time these private statutes were passed, no such legal mode.

(*a*) It is certain that the trustees could not have been discharged by any Court in New York, without hearing the children by their legally appointed and responsible representative, in answer to a bill in equity.

> It was in 1830, that for the first time provision was made for accepting the resignation of a trustee upon petition, and then by a section of the Revised Statutes, as follows: "Upon the petition of any trustee, the Court of Chancery may accept his resignation and discharge him from the trust, under such regulations as shall be established by the Court for that purpose, and upon such terms, as the rights and interests of the persons interested in the execution of the trust, may require," 1 *R. S.*, 730, § 69. In reference to this statute Chancellor WALWORTH observed, in the matter of *Van Wyck*, 1 *Barb. Ch.*, 567. "Independent of any statutory provisions on the subject, this Court has no power upon a mere petition to discharge a trustee, or to accept his resignation and to appoint another in his place, without the consent of all persons who now are, or who upon

any future contingency may be interested in the execution of the trust. The usual course of proceeding for the purpose of changing a trustee, is by bill, to which bill all persons interested are either actually or constructively made parties. The Revised Statutes have authorized this Court upon petition, to accept the resignation of a trustee, and to discharge him from his trust in certain cases, 1 *R. S.*, 730, § 69. But it is at least doubtful whether this statutory power extends to the case of an executor."

Thus it appears, that as the law stood when this private act was passed, if the trustees could have been discharged at all, it was only upon a bill to which the children would have been necessary parties, and their appearance by a guardian *ad litem* would have been indispensable. For want of such appearance in a suit to foreclose a mortgage executed by the substituted trustee, Vice-Chancellor Sandford, one of the ablest equity Judges New York has ever had, declared that the children of Mr. Clarke were not bound by the foreclosure, and permitted them to redeem (*Williamson* a. *Field*, 2 *Sandf. Ch.*, 548, 564, 565). In that very case Thomas B. Clarke was a party defendant, and it was urged that he represented his children, but the contrary was adjudged. That is as much the settled law of New York as anything else determined in this long litigation.

The language of the learned Vice Chancellor deserves in this connection to be quoted. "It is contended by the defendants that it was unnecessary to make the children of Thomas B. Clarke, who were then *in esse*, parties to the suit upon Mapes and Oakley's mortgage, for two reasons: *First*, * * * *Second*, If the children had an interest, they were sufficiently represented in the suit by their father, who was their trustee and clothed with the legal title, and who was in effect their special guardian, under the statutes and the

orders of this Court providing for the disposition of the property. * * * * *

The doctrine of representation stated in Mr. Calvert's treatise (p. 19, 20), has no application, as may be seen by referring to what he says of trustees and *cestuis que trust*, *Calvert*, 207, &c. * *

Nor does it aid the defendant's case, that T. B. Clarke was the natural guardian of these children, or that he was in effect their special guardian f r the management of the estate. Their case is presented in all its strength by the fact that he was their trustee and veste l with the whole legal title; and this, as I have shown, does not suffice" (2 *Sand. Ch.*, 548, 564, 565).

(*b*) The trustees could not have been discharged by the Courts of New York, even upon bill in equity, except for good reasons, sanctioned by the existing law and approved by the Court. No such reasons are shown in the present case; and the argument, if argument there be, must amount to this, that the Legislature has power to discharge a trustee from his obligations, without any cause or reason whatever.

G. F., by his will, in 1806, devised his estate to trustees therein named and for the uses and trusts therein mentioned, and to establish a perpetual charity for the education of poor orphans. For the perpetuation of the trustees, the testator directed that the places of those who died should be supplied by the election of a freeholder and resident of the County of Dauphin, who was also to be a member of some Protestant Church, said election to be made by the trustees remaining, which election was subject to the approval of the Court of Common Pleas of Dauphin County.

Trustees were regularly constituted under such will until 1835, when the then existing board resigned, and, thereupon their places were supplied by appointments made by the Supreme Court. In 1839

the then acting trustees and the principal of the Orphan's House were incorporated by act of Assembly with perpetual succession, &c., and accordingly trustees and principal were regularly constituted until April 21, 1846, when an act of Assembly was passed authorizing the Court of Common Pleas of Dauphin County to appoint the trustees on the nomination of the respective Synods of the Lutheran Church, lying east and west of the Susquehanna River. In pursuance of this act of 1846 trustees were nominated by the said Synods and appointed by said Court September 7, 1846.

It was *held*, that the trustees elected under the provisions of the will of G. F. and the act of incorporation of 1839, had vested rights under said will and act of incorporation; that, in addition to their own franchises, they were the depositaries and guardians of the vested rights of the beneficiaries, the orphan children; that they were divested of those rights, privileges and franchises by the act of 1846, without a trial by due course and process of law; by reason of which, the solemn contract of the State, as contained in the charter of 1839, was impaired, and that therefore the act of April 21, 1846, was unconstitutional and void.

Brown *v.* Hummell, 6 Penn. St., 86.

(*c*) The better opinion is, however, that the trustees could not at that time have been discharged, under the same circumstances, by the Courts of New York, upon their own application, even upon bill regularly filed.

There was no hardship in this. They had voluntarily undertaken the obligation, and reason as well as law should seem to require its performance.

If they had been proceeded against for misconduct, they might for that have been removed, just as

a corporation, for abuse of its privileges, may be ousted from them.

Mr. Justice STORY, in his treatise on *Equity Jurisprudence*, though he treats of the removal of trustees, makes no mention of their being discharged at their own request. (*Story's Eq.*, §§ 1191*a*, 1287, 1288, 1289.)

Mr. LEWIN, in his treatise on *Trusts and Trustees*, says (p. 260): "It is a rule, without any exception, that a person who has once undertaken the office, either by actual acceptance or by construction of law, cannot discharge himself from liability by a subsequent renunciation. The only mode by which he can obtain a release, is either under the sanction of a Court of Equity or by virtue of a special power in the instrument creating the trust, or with the universal consent of the parties interested in the estate." In a subsequent part of his treatise, he mentions the relinquishment of a trust as being possible in a proper case, upon a bill filed by the trustee making all persons parties who have any interest in the trust estate.

But it will probably be found on examination that the cases cited by him, are all cases where a bill was filed by the beneficiary, except four, and these are late cases before the Master of the Rolls, since the passage of the trustee acts, and under very special circumstances. Two general acts of Parliament have been passed to enable trustees to retire, on petition to the Court of Chancery, one known as *Sugden's Act*, 1 *Will.* 4, *Ch.* 60, § 22, and the other as *Cranworth's Act*, 23 & 24 *Vict.*, *Ch.* 145, §§ 1, 33.

Bill by trustee to be removed, filed against *cestuis que trust*. LORD CHANCELLOR MANNERS: In England, a trustee, after he has acted, is never removed at his own desire. It is done in Ireland, but trus-

tee must do it at his own expense. He must pay the costs of the suit.

Hamilton *a.* Fry, 2 Molloy, 458.

Bill filed by trustee of a marriage settlement against *cestuis que trust*, and his co-trustees, to be discharged. Settlement contained a proviso that if a trustee should be *desirous of a discharge* before full execution of the trusts, the *cestuis que trust*, might nominate a successor.

The Lord Chancellor (Lord PLUNKETT) declined to release the trustee, unless some other person could be found to undertake the trust.

Ardill *a.* Savage, 1 Irish Equity, 79.

(d) If the Courts of New York had had the power, there is no reason for supposing that they would have seen occasion for its exercise in regard to these trustees. At all events, whether they could have obtained their discharge, even supposing the power to exist in its greatest amplitude, is a matter of mere conjecture.

THIRD POINT.—Upon the whole the plaintiffs submit that, passing by all the questions heretofore discussed, the following propositions are established :

First.—That whether Clarke be regarded as a donee of a power or as a trustee, his authority to convey the legal title was qualified and limited by the same statutes by which he was placed in his position.

Second.—That one of these qualifications and limitations was, that one-half of the estate should be *held* by him to the uses and upon the trusts of the will and was therefore beyond his power of alienation.

Third.—That such half was to be set off before he began to sell, and when once set off could not be again taken up and subjected to alienation; or in other words his authority to partition, when once executed, was exhausted, and could not be executed anew.

Fourth.—That the acts of the Legislature, by which the testamentary trustees were discharged from all their obligations to the beneficiaries and displaced from the trust, and Clarke was inducted into the trust or power, whichever it may be called, were unconstitutional, because they impaired the obligation of the contract of the testamentary trustees.

For the reasons thus stated, either that the lots in controversy being in the western moiety of the estate, as first divided, were not subject to sale under the private statutes in question, or that the statutes are void, so far as they assumed to discharge the testamentary trustees, the plaintiffs submit that the judgment should be reversed.

DUDLEY FIELD,
Plaintiff's Attorney.

DAVID DUDLEY FIELD,
Of Counsel.

Supreme Court of the United States.

WILLIAM H. WILLIAMSON and others,
Plaintiffs in error,

vs.

JAMES H. SUYDAM,
Defendant in error.

Annexed are the opinions delivered in the case of Williamson *vs.* Moore *et al.*, and in the case of Clarke *et al. vs.* Davenport, to which reference is made by the points submitted on the part of the defendant in error. 1

In the case of Suydam, plaintiff in error, *vs.* Williamson *et al.*, defendants in error (24 How., p. 427), the main question was whether the deed from Thomas B. Clarke (which embraced the property in controversy in the present suit) to Peter McIntyre, was a valid operative conveyance. In the opinion delivered in that case, Judge Campbell remarked that, "in 1857 the case of Towle *vs.* Forney came before the Superior Court of the City of New York, and involved the title to one of the lots conveyed to McIntyre by Clarke, and sold under the decree of foreclosure. That case was 2 determined in that Court, and its judgment affirming the validity of that title was sanctioned in the Court of Appeals subsequently to the decisions reported in the 8th of Howard in this Court. The Court of Appeals, in answer to the argument derived from the adjudication in this Court, say that, perhaps, there may be a difference between the cases which were determined in this Court, in 1854, and that case; but the more suitable answer is, that, as between the judg-

ments of their own courts and those of the Courts of the
3 United States, their own is binding where there is a conflict between them, except in cases arising under the Constitution and laws of the United States, when the judgments of the Supreme Court are of controlling authority. That Court declares that the judgment in Clarke *vs.* Van Surlay (15th Wend., p. 436) is a determination of the Court of last resort in this State, not only upon all questions of law in the case under consideration, but upon the identical title under which the plaintiff in the reported case, and the defendant in the present case, claimed to own the premises
4 in controversy in the respective suits. In such a case, there being no pretense of collusion, and no reason to impute carelessness or inattention to the judges, the determination should be considered final and conclusive upon all persons in interest, or who may become interested (P. 432) in the question, as well as upon the parties to the particular action," and added that "the question is now presented to this Court, whether they should adhere to their own opinion as expressed in the cases in 8th Howard, or acknowledge the authority of the Courts of New York to settle, finally,
5 the contest upon this title" (P. 433). After referring to several cases, in which this Court has held that when any principle of law establishing a rule of real property has been settled in the State Courts, this same rule will be applied by this Court, the learned judge observed that in the case then before the Court there exists no doubt as to what was the settled opinion of the Courts of New York as to that title, and reversed the judgment of the court below (P. 435).

It would thus seem that every possible question that could arise upon the facts in the present case, which tended
6 to show that the deed from Thomas B. Clarke to Peter McIntyre was a valid, operative conveyance, was disposed of, either directly or by necessary intendment, by the judgment of the Court upon the facts presented in the case last referred to.

In the case of Williamson *vs.* Moore, the question arose as "to whether a trustee can be charged with a violation of duty, and made liable as for a breach of trust, for surrender-

ing his trust, in obedience to the law of the land;" which question necessarily involved another enquiry, to wit, whether the several Acts of the Legislature, divesting the 7
trustees of the estate devised in trust by Mary Clarke, did not impair the obligation imposed upon them to perform the trust.

The Court in this case sustained the validity of the Acts of the Legislature, which discharged the trustee from the performance of the trust. Allen, Justice, in delivering the opinion, remarked—"The Legislature, acting as *parens patriæ*, had the right to act for those under disability, and who could not act for themselves, and its acts in the exercise of this tutelary power will bind not only per- 8
sons *in esse*, but those yet to be born." Assuming, however, that the question so presented was one arising under the Constitution of the United States (in regard to which this Court has paramount jurisdiction), this Court has already pronounced upon it. Judge Campbell, in the case of Suydam, plaintiff in error, *vs.* Williamson *et. al.*, defendant in error, remarked that "The title of the devisees of Mary Clarke was divested by authority conferred by the Legislature of the State, which was exercised subject to the oversight of her own tribunals. The persons affected by 9
this authority were natives of the State—children under the superintending care of the parental jurisdiction of the State. It was in the constitutional exercise of this supreme and exclusive jurisdiction, that this title was disturbed." (P. 433).

In the case of Clarke *vs.* Davenport, Denio, Justice, who delivered the opinion, remarked—"The question whether T. B. Clarke had legal authority, under the Acts of the Legislature, and the orders of the Court of Chancery, to sell the land devised to him for life, was settled many years 10
since in the Court for the Correction of Errors; and the judgment given has recently been confirmed and acted upon by this Court." (The orders here referred to embrace the order dated 15th March, 1817—see p. 29—which divides the property by a line running east and west).

After citing the cases of Cochrane *vs.* Van Surlay (20

Wend., 365), and Towle *vs.* Forney (4 Kern., 423), the learned judge remarked—"In the last mentioned case, *we stated some considerations to show that the grounds of the judg-*
11 *ment of a Court of last resort, passing directly upon the title to a tract of land, ought not to be re-examined upon the same questions arising between other parties, in respect to other portions of the same tract, except in extraordinary and very exceptional cases.*" The words here italicised were not italicised in the original opinion.

When the points in this case were prepared and printed, it was intended, on the part of the defendant in error, that it should be argued orally before this Court. Since then, however, it has not been deemed necessary to do so, the
12 defendant in error being willing to submit the case, on his part, upon printed briefs, which he believes cover all the grounds necessary to sustain the rulings of the Court below. He deems it proper, however, to add, that when the suit was commenced, in 1845 (over 20 years since), the Honorable Stephen J. Field, now one of the members of this Court, was the attorney of record on the part of the plaintiffs in the Court below (fol. 3).

N. DANE ELLINGWOOD,
of Counsel for defendant in error.

IN COURT OF APPEALS.

13

WILLIAM H. WILLIAMSON,

vs.

CLEMENT C. MOORE *et al.*

April Term, 1862.

ALLEN, J.—The acts and proceedings brought in question in this action have been so often before the courts of this State, as well as before the Supreme Court of the United States, and the effect and validity passed upon, that but little is left for us except to re-affirm and apply the principles of former adjudications. The only question presented at all new is, whether a trustee can be charged 14
with a violation of duty and made liable as for a breach of trust, for surrendering his trust in obedience to the law of the land. Under the decisions of the Court of last resort in this State, now acquiesced in and followed

by the Supreme Court of the United States, the case of the plaintiff has come to rest upon a claim involving that question, and that only, so far as the Courts are concerned. If that should be decided adversely to the defendants, other objections of more or less difficulty will have to be
15 met by the plaintiffs; but such objections relate rather to the liability of the defendant, and the form and the time of commencing the action, than to the existence of a meritorious claim. Until the decision of Suydam *vs.* Williamson (24 Howard U. S. Rep., 427), the plaintiff may have hoped by a different decision of that case by the Supreme Court of the United States, to overthrow or put a construction upon the acts of the Legistature, which would obviate some of the difficulties which surround this case. But that decision adopted, as the rule of that Court, the principles
16 which had before been settled by the Courts of this State as affecting this trust and the title to the trust property conveyed by the statutory trustee, after the removal of the testamentary trustee. There is no allegation of any act of waste or breach of trust by the trustees before April 1, 1814. On that day an act of the Legistature was passed authorizing the Chancellor to appoint other trustees in "the place and stead of the said Benjamin Moore and Charity, his wife, and the said Elizabeth Marshall, who are hereby discharged from the trusts in the said will con-
17 tained."

An elaborate argument was put forth by counsel against the binding force of that law as without the limits of the constitutional authority of the Legislature. But that is not an open question. The law was deliberately sustained and full effect given to it by the Supreme Court, and the Court for the Correction of Errors, in Cochran *vs.* Van Surlay (15 Wend., 436; 20 Id., 365), by the Superior Court of the City of New York, and this Court, in Towle *vs.* Forney (4 Duer, 164; 14 N. Y., 423), and not denied
18 by the Supreme Court of the United States in either of the cases in which the title to parts of this trust estate has been considered by that Court. Suydam *vs.* Williamson, *supra*, as we have seen, directly adopts the decisions of the Courts

of this State as a rule of property obligatory upon that Court in all questions affecting the trust and trust property. Williamson *vs.* Berry (8 How. U. S. R., 495), did not hold the law void or inoperative for any reason; but the Court was of the opinion that the proceedings of the Court of Chancery, and the acts and conveyances of the trustee appointed by subsequent acts of the Legistature, were not in pursu- 19
ance of the several legislative acts, and that therefore no title passed to the purchasers and grantees under such proceedings and conveyances. The difference between the Courts was as to the due and effectual execution of the power devolved upon the Court of Chancery, and the substituted trustee, and not as to the actual devolution of the trust, and the discharge of the original trustees. The several acts of the Legislature, first that of 1814, discharging the defendants' ancestors, and their co-trustee, and devolving the trust on the Court of Chancery, and the 20
subsequent acts of 1815 and 1816, making Thomas B. Clarke the trustee, and conferring on him certain powers, have in the cases cited, and also in Clarke *vs.* Davenport (1 Bosw., 95), been held to be constitutional and valid exercises of legislative power.

The Legislature, acting as *parens patriæ*, had the right to act for those under disability and who could not act for themselves, and its acts in the exercise of this tutelary power will bind not only persons *in esse*, but those yet to be born. (Leggett *vs.* Hunter, 19 N. Y., 445). 21

The act of 1814 being thus effectual and operative, discharged the testamentary trustees and devolved the trust upon the Court of Chancery. It did so in terms, and this construction and effect is given to it by all the cases. In Williamson *vs.* Berry, the Supreme Court of the United States rule, in response to one of the points certified to that court, that the act of the Legislature divested the estate of the trustees under the clause of the will of Mary Clarke. Judge Bronson, in Clarke *vs.* Van Surlay, says: "The act of 1814, pursuant to their request, discharged Benjamin 22
Moore and his wife, and Elizabeth Marshall, from the execution of the trusts of the will. The Chancellor, in the

same case, in 20 Wend. R., speaking of the act, says: "By that act the trustees were discharged, and the legal title to the premises was to vest in the new trustees to be thereafter appointed by the Court of Chancery. The Court of Chancery could undoubtedly have removed the trustees for cause, upon proper application, to which all parties in
23 interest should be parties, without the authority of the act of the Legislature. But the act removed them at once, and in the exercise of its rightful authority over the persons and property of infants, the sovereign power of the State assumed the trust and devolved its execution upon the Court of Chancery. It being an act within the jurisdiction of this highest tribunal, the reason of its passage is not a proper subject of inquiry or discussion. Whether the law was wise or unwise, prudent or imprudent, passed for sufficient or insufficient reasons, is immaterial. Courts cannot
24 sit in review of acts of legislation within the scope of legislative authority, or supervise the discretion of the Legislature. The reasons for the discharge of the defendant's ancestors from the responsible trust, appear to be ample, and such as would have constrained the Court of Chancery to relieve them of their duties. Bishop Moore was a paralytic, enfeebled mentally and physically, and Mrs. Moore was a *feme covert,* and was entitled to be discharged with her husband; and these were good reasons why the Court should not have continued her a trustee after discharging
25 her husband. The same reasons which made it advisable not to select a *feme covert* as a trustee, rendered her discharge proper when her husband became incompetent, or when circumstances rendered his discharge proper. (Lewin on Trusts, sec. 4, 5). It was certainly no breach of trust to consent to relinquish it in favor of the Court of Chancery or such trustee as that Court might appoint. It is true that there is no proof of any consent of the trustees to the passage of act of 1814, and such consent was by no means essential to the jurisdiction of the Legislature or the validity
-v of the act. But assuming that they not only assented to, but petitioned for, the passage of the act, there was no breach of duty in asking the Legislature to do what they might

properly and lawfully do; and if the reasons assigned for the act were adjudged sufficient by the body to which they were addressed, and who alone can pass upon them, they must be held sufficient whenever the act comes collaterally in question before any other tribunal.

It is probably the first instance of an action for a breach of trust where the violation of duty consisted in being removed from office by a tribunal of competent jurisdiction, the acts of which are not only valid but supreme, and not 27
the subject of review. With the removal of the trustees, and their consequent loss of title to the trust estate, all their power over or in connection with the trust ceased, and they cannot be charged with any subsequent waste of the property or neglect of duty connected with it. That part of the act of 1814, authorizing a disposal of the trust property, by the trustee thereafter to be appointed, had no connection with the removal of the testamentary trustees. They were parts of the same act, it is true, and took effect simultaneously. When the authority 28
to sell took effect, the original trustees had ceased to be such. But that part of the act has been fully considered and sustained by Judge Bronson, and every other Judge who has spoken upon the subject; that is, the act has been shown to be within the proper limits of the authority of the Legislature, as providing for the suitable maintenance and education of infants from property, which, without such action, could not be appropriated to such purpose. There is nothing in this case to show that the discretion was unwisely exercised in this case. The trust power may 29
have been unwisely and improperly executed by those charged with its execution by subsequent acts of the Legislature, but, so far as appears, the power conferred by the act of 1814. executed in the spirit and to the extent conferred, would not have proved unwise or inexpedient. How it appeared to the Legislature that the property devised was nearly unproductive and incapable of being improved so as to yield an adequate revenue for the maintenance and support of the said Thomas B. Clarke and his family, does not appear. It is not shown that it so appeared by any 30

representation or suggestion of the defendants' ancestors, the trustees. At the most, it was but a recital of the judgment of the Legislature upon questions affecting the interests of the infants in whose behalf they were acting, and upon which they based the opinion that the benevolent intentions of the testatrix would be defeated without the interposition and aid of the Legislature. If they misjudged, the trustees, who were by the same act removed, cannot be held responsible for the consequences. The question might
31 be different if it was charged that the proceeding was devised and carried out by the trustee in concert and collusion with Thomas B. Clarke, with the fraudulent intent of putting the trust estate within his power, to the end that he might, by means of the several proceedings alleged, convert the same to his own use in fraud of the rights of his children, the *cestuis que trust.* But no fraudulent intent to dispose of the property in any way to defraud the infant children is alleged or proved. It must be borne in mind that the act removing the trustees did not vest the title or
32 devolve the trusts upon Thomas B. Clarke. When the original trustees ceased from office, the trust was left in safe hands, to wit, the Court of Chancery.

It was the next year (1815) that Thomas B. Clarke had trust powers conferred upon him by another act of the Legislature. The only connection between the two acts is the recital in the latter, that no suitable person had been found willing to undertake the trust under the former act of 1814. The trustees named in the will had been divested of the trust estate, and had no hearing or right of hearing
33 on the passage of the last act. It does not appear that they had knowledge of its passage, or of any proceedings under it. They were not, and could not have been parties to any proceedings in Chancery for the sale of the trust estate, or the disposition of the proceeds. All the spoliations and wrongs complained of, took place under the act of 1815 and orders of the Court of Chancery, and conveyances made in pursuance of that act and the act of 1816. It is true that if the defendants had not been removed as trustees, it is probable that the estate would have been better

cared for. But the removal was not a breach of trust. 34
The difficulty was not that the trustees resigned or were removed, but that the Legislature devolved the trust upon an incompetent substitute, and the Court of Chancery was not as vigilant as it might have been in its control of that substitute.

The representatives of those who had no power to prevent the mischief, and who, having been discharged from the trust by competent authority, were charged with no duty, cannot be held responsible for consequences of acts not theirs in any legal sense, and which they not only could 35
not control, but with which they had no connection, actual or constructive. The responsibility of those for whom, and for whose acts the defendant is sought to be charged, were only commensurate with their duties. By a valid law of the Legislature, they were discharged from all duties, and divested of all rights, and those rights and duties devolved on others. It follows that these responsibilities ceased, and neither they nor the defendants, as their heir or representative, can be held responsible for the subsequent administration of the trust. 36

The judgment must be affirmed with the costs. All the Judges (except Selden, Ch. J., absent) concurred.

(A copy.)

(Signed,) E. Peshine Smith,
State Reporter.

IN THE COURT OF APPEALS

OF THE STATE OF NEW YORK.

BAYARD CLARKE *et al.*,

vs.

JOHN A. DAVENPORT *et al.*

Opinion.

DENIO, J.—The question whether T. B. Clarke had legal authority under the acts of the Legislature, and the orders of the Court of Chancery, to sell the land devised to him, for life, was settled many years since in the Court for the Correction of Errors; and the judgment given has recently been confirmed and acted upon by this Court. (Cochrane *vs.* Van Surlay, 20 Wend., 365; Towle *vs.* Farney, 4 Kern. 423.) In the first of these cases, the facts were nearly identical with those in the one under consideration. The
38 deed from T. B. Clarke to De Grasse, under which the defendant there claimed title, expressed a pecuniary consideration, and there was no evidence of the manner in which it had been paid. Judge Bronson remarked in giving judgment, that so far as it appeared, it was a sale for cash. In the case in Kernan's reports, Clarke had conveyed the premises in controversy to one McIntyre, partly for cash, and in part, on account of a contract by which the grantee was to furnish board and necessaries for Clarke and his children. If there is any distinction between that
39 case and the one now before us, the facts of the latter are the most favorable for the defendant, inasmuch as a sale wholly for cash was free from some of the objections alleged against such as were made on other considerations. In the last mentioned case, we stated some considerations to show that the grounds of the judgment of a Court of last resort, passing directly upon the title to a tract of land, ought not to be re-examined upon the same questions arising between other parties, in respect to other portions of the same tract, except in extraordinary and very excep-

tional cases. The reasons for holding the former judgment 40
conclusive in this case, are strengthened since the determination of the Court of Errors has been re-affirmed by the judgment of another Court of last resort, which has succeeded that in which the first decision was given. We must, therefore, assume that T. B. Clarke was lawfully empowered to sell the three lots which he conveyed to Thomas Ash.

But the plaintiffs' counsel maintains, that it was incumbent upon the defendant to state and prove facts sufficient to show that Ash was a *bona fide* purchaser for value; or, 41
if he was unable to show that, that then he ought to prove that he parted with value to Ash, and was himself ignorant of the existence of any facts which could impeach his title. In fact, the defendant has given no evidence of the payment of the consideration by Ash to Clarke, or by himself to Ash, other than that which the conveyances furnish. But I do not think it was incumbent on him to furnish such proof. Clarke was a trustee appointed by law to sell this land for the purposes mentioned in the statute. The defendant produces the deed to Ash, which sets forth a sale 42
pursuant to the power. This is *prima facie* evidence of the sale and of the payment of the purchase price. (Cases in Cowen and Hill's notes, p. 217.) The plaintiff has not shown anything which has the effect of putting the defendant upon proving, in any other manner, that he paid value for the lots. If it had been shown that the sale was an act of fraud, or if the plaintiff had an equity against Clarke, which would have been displaced only by a sale to a *bona fide* purchaser, the defendant would have been obliged to show that he held that position. The fact that Clarke was an 43
irresponsible and an imprudent man, and that the result of his management of the estate with which he was entrusted by the Legislature and the Court of Chancery, had been detrimental to the plainliffs, is too vague to render the deed inoperative, or to cast upon the grantee the burden of showing that he purchased for value paid.

Nor was this a case in which the grantee was obliged to show that the money had been applied to the objects of the

trust. Prior to the Revised Statutes, when the trust was to
44 sell lands for the payment of specified debts or legacies, the purchaser must see to the appropriation of the purchase money; not so, however, where it is for the payment of debts *generally*, and *a fortiori* where it is for the support and maintainance of others. In such cases, as the money is to be retained for an indefinite period of time by the trustee, the purchaser could never know when his purchase was complete, if he were obliged to wait until the money had been used. (Story Eq. Jur., § 1131.)

It was decided in the cases referred to, that the master's
45 approval (?) was not requisite where the sale was for cash.

If the defendants' title, under J. B. Clarke, was not impeachable, there was, of course, no objection to his getting title under the corporation sale. But if there was a defect in his original title, that was no objection to his strengthening it by purchasing under the lien, unless he stood in some fiduciary or confidential relation to the owners of the land.

I conclude, therefore, that there was no error in the judgment of the Superior Court. That judgment must, therefore, be affirmed.

46 Selden, J., dissented; Welles, J., expressed no opinion all the other Judges concurred.

(Copy.) E. PESHINE SMITH,
State Reporter.